

**THE SUBSTANTIVE INDEPENDENCE OF THE JUDICIARY UNDER
THE CONSTITUTIONS OF BANGLADESH AND MALAYSIA: A
COMPARATIVE STUDY**

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in fulfilment of the requirements for the award of the Degree of**

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M. Ehteshamul Bari

(Matric No: LGA090040)

Faculty of Law

University of Malaya

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Registration/Matric No: LGA 090040

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Abstract

The present research work, a comparative study as to the existing systems of appointment of judges in Malaysia and Bangladesh which is undertaken to examine its strengths and under-strengths and to recommend a suitable mode for appointing judges of the superior courts for excluding patronage appointment and ensuring the appointment of men 'of stern stuff and tough fibre, unbending before power' in the higher judiciary, is divided into five chapters.

The essence of each of the chapter is as follows:

Chapter I deals with the 'Introduction' in which role of the judiciary, development of the concept of the independence of the judiciary, traditional and modern meanings of judicial independence and importance of an independent judiciary in a democratic state have been examined. Then judicial independence as enshrined in the Constitutions of Malaysia and Bangladesh has been outlined.

Chapter II examines critically the constitutional (with reference to relevant amendments) and legal provisions concerning appointment of judges to the superior courts of Malaysia.

Chapter III considers analytically the constitutional (with relevant amendments) and legal provisions relating to the appointment of judges of the Supreme Court of Bangladesh with special reference to the leading decisions of the apex court in this regard.

Chapter IV makes a comparative study of the constitutional and legal provisions relating to appointment of judges of the superior courts in Malaysia and Bangladesh.

Chapter V, titled 'Conclusion', summarises the discussions carried out in the preceding four chapters and puts forward recommendations for a) the abolition of the system of appointment of additional judges/judicial commissioners, b) exercising the executive power of increasing the number of judges of the superior courts either on the recommendation of a judicial service commission or upon the request of the Federal Court/the Supreme Court and c) the

establishment of a judicial appointments commission, consisting of majority ex-officio members from the judges of the Supreme Court, as a recommendatory body, the recommendation of which shall be binding on the appointing authority.

where adopt, conscientious and carefully... the Dissertation has taken its shape... have immensely benefited from his comments, suggestions and suggestions... research work. It is he who played a crucial and pivotal role in supporting my research proposal to the Faculty meeting.

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Chapter 1: Introduction

A. Judiciary's Role as an Organ of the Government

The Government, which is one of the four¹ constituent elements of the state- a politically organised community established as a natural, necessary and universal institution, is the means through which the will of the state is formulated, expressed and realised. Greek philosopher Aristotle (384-322 BC) identified three elements or powers in a government and judicial element or system of courts is the third element.² Thus judiciary is the third branch of the government, to use the words of Alexander Hamilton, 'the weakest of the three departments of powers' having 'no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty.'³

The judiciary is an important organ of the government which primarily administers the law by expounding and defining its true meaning. The interpretation of the law is the proper and peculiar province of the judiciary. It applies the existing law to resolve disputes between private individuals, between large private organisations (i.e. companies), between public bodies (i.e. government departments, local authorities, nationalised industries etc) or between a private individual and a government department. The judges do not implement their political views; they apply facts to legal rules and interpret those as best as they can. In a free

¹ The other constituent elements of the state are: a) population, b) territory and c) sovereignty.

² Aristotle, *The Politics* (translated by Ernest Barker and RF Stalley) (Oxford: Oxford University Press, 1995) at pp. 165-177.

³ Alexander Hamilton, 'The Federalist No. 78', in Alexander Hamilton, John Madison and John Jay (eds), *The Federalist or the New Constitution* (Oxford: Basil Blackwell, 1948) at pp. 396-397.

society, the necessity of the judiciary is keenly felt to ascertain and decide both public and private rights, to administer justice, to punish crimes and to protect the innocent from injury and usurpation. The judges may by their rulings, their dicta, powerfully and usefully contribute to adapt the law to the needs of a rapidly changing society. In countries where there is a written constitution, which cannot be overridden by ordinary legislation, the judges are guardians of the constitution and may declare a statute to be unconstitutional and invalid and thereby ensure the observance of the rule of law. As Alexander Hamilton says: '... No legislative act ... contrary to the constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal It [constitution] therefore belongs to them [the judges] to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.'⁴ In the same vein, James Bryce says:

When questions arise as to the limits of the powers of the Executive or of the Legislature, or in a Federation- as to the limits of the respective powers of the Central or National and those of the State Government, it is by a Court of Law that the true meaning of the Constitution, as the fundamental and supreme law, ought to be determined, because it is the rightful and authorised interpreter of what the people intended to declare when they were enacting a fundamental instrument.⁵

The judiciary seeks to evolve from the competing social interests, which appear before them, a solution that maximises the public advantage. It makes from a given and particular instance a universal rule by which the conduct of other men will be shaped and determined. Thus the judiciary plays a vital role to shape the life of the community and to secure the observance of the rule of law.

⁴ Ibid.

⁵ James Bryce, *Modern Democracies*, vol. II (New York: Macmillan, 1921) at pp. 384-385.

The judiciary can perform its functions properly only in a democratic country and, as such, a democratic government is, a prerequisite for the existence of an independent and courageous judiciary. For, in a totalitarian state, the judiciary is expected to act in accordance with the policies of the central authority and, as such, political absolutism is to have free reign.⁶ 'If the executive could shape judicial decision', rightly says Harold Laski, 'in accordance with its own desires, it would be the unlimited master of the State.'⁷ In the words of the UN Special Rapporteur on the Independence of Judges and Lawyers, who in his Report of 2004, said: 'The rule of law and separation of powers not only constitute the pillars of the system of democracy but also open the way to an administration of justice that provides guarantees of independence, impartiality and transparency. These guarantees are ... universal in scope ...'⁸ The judiciary's interpretation of the law must not be bound by the will of the executive, rather it must be able to call the executive to account and protect the life as well as liberty of the governed. Thus it is evident that the more independent the position of the judiciary, the more likely it will be able to realise the purpose of the institution. Therefore, the independence of the judiciary is the central principle underlying the administration of justice.

B. Judicial Independence as a Result of the Application of Doctrine of the Separation of Powers

At modern times, it is contended that the independence of the judiciary is principally a result of the application of the doctrine of separation powers, the doctrine which generally means the distribution of the governmental powers among its three organs- executive, legislative and judiciary. French Jurist Montesquieu, who developed the modern formulation of the doctrine of separation of powers in 1748 after the English Philosopher John Locke (who had

⁶ For example, in the Nazi era in Germany, there was no independent judiciary as the judges were expected to follow the wishes and orders of the Fuehrer. In the Third Reich (the Federation), judges were under a duty to consider 'the will of the Fuehrer' as the supreme role.

⁷ Harold Laski, *A Grammar of Politics* (London: Harper Collins Publishers Ltd, 1967) at p. 542.

⁸ Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, 2004, E/CN.4/2004/60, at para. 28.

propounded his theory in 1690), was concerned with the preservation of political liberty, by separating, in particular, the judicial power from the executive and legislative organs of the government. As he said:

Political liberty is to be found only when there is no abuse of power To prevent this abuse, it is necessary from the nature of things that one power should be a check on another When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty Nor is there liberty if the power of judging is not separated from legislative power and from executive power. If it were joined to legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. If it were joined to executive power, the judge might behave with violence and oppression. Thus would be an end of everything if the same person or the same body, whether of the nobles or of the people, were to exercise these three powers: that of enacting laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.⁹

Blackstone also held the same view: 'In all tyrannical Governments ... the right of making and of enforcing the laws is vested in one and the same man, or the same body of men; and wheresoever these two powers are united together there can be no liberty.'¹⁰

However, it can safely be said that the maintenance of the independence of the judiciary is a 'part of the Montesquian theory of division of power. The tri-partition of the public decision-makers into the executive, the legislative, and the judiciary is based on the idea that each of

⁹ Montesquieu, *The Spirit of the Laws*, vol. 1, (Cambridge: Cambridge University Press, 1989) at p. 157.

¹⁰ O. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (London: Sweet and Maxwell, 1978) at 45-46.

these three acting parts should have a certain independence in relation to each other.¹¹ Although the doctrine of separation of power has influenced constitutions of the democratic countries of the modern world, it has not been strictly implemented in any single democratic country particularly in countries where the Westminster system of government is in existence such as the UK, Australia, India, Pakistan, Malaysia and Bangladesh. For, the separation of powers between the executive and the legislative in this form of government does not in practice exist; the ministers- head of the ministries- are members of the parliament and are directly answerable to it. However, the doctrine may now be said to have received its application in democratic countries by securing the independence of the courts from the control of the executive.¹² The independence of judiciary is presently a fundamental aspect of the separation of powers in a state governed by the rule of law.

C. Traditional and New Conceptual Dimensions (Four Meanings) of Judicial Independence

i) Traditional Meaning of Judicial Independence

The most traditional and central meaning of the independence of the judiciary is that the judges are in a position to arrive at their decisions free from interference of the political branches, especially the executive and apprehension for suffering personally as a result of exercising their judicial powers. The Congress of the International Commission of Jurists held in New Delhi in January 1959 accepted this approach when it said: Judicial independence '... implies freedom from interference by the executive or legislative with the exercise of the judicial function.'¹³ Sir Harry Gibbs, the former Chief Justice of Australia, also refers to the traditional meaning of judicial independence when he says: '... no judge

¹¹ Quoted in Gustaf Patren, 'The Independence of the Judiciary', in *Report of the Symposium on the Independence of Judges and Lawyers* (Helsinki, Nov. 1980) at p. 95.

¹² O. Hood Phillips and Paul Jackson, *supra* note 10 at 15.

¹³ Article 1, Report of Committee IV, International Congress of Jurists, (New Delhi, 1959).

should have anything to hope or fear in respect of anything which he or she may have done properly in the course of performing judicial functions. So neither the parliament nor the executive, nor anyone else, should be able to bring pressure of any kind to bear upon a judge in the performance of judicial duties.’¹⁴

Thus the traditional meaning of the independence of the judiciary, in fact, refers to the personal independence of the judges.

ii) Four Meanings of Judicial Independence

The norms developed specially at the international level since 1950s have thickened and broadened the concept of judicial independence. It has now four facets including the traditional one:

- a) substantive independence;
- b) personal independence;
- c) collective independence; and
- d) internal independence.

It should be pointed out that apart from the traditional concept of personal independence, the concept of substantive independence of the judges is also universally recognised by law and legal scholars. These two- personal independence and substantive independence- comprise the independence of an individual judge. The independence of an individual judge carries two opposite connotations: negative and positive. In the negative sense, the concept of judicial independence implies freedom from influence, inducement, pressure, threat or interference from any quarter including executive, legislative or private individual. In the positive sense,

¹⁴ Garry Sturges and Philip Chubb, *Judging the World: Law and Politics in the World's Leading Courts* (Sydney: Butterworths, 1988) at p. 149.

judicial independence means the freedom of judges in performing their judicial functions impartially in accordance with their own understanding of law and fact.¹⁵

On the other hand, the concepts of collective independence and internal independence constitute the independence of the judiciary as a whole and have developed in the 1980s. They were recognised first by the International Bar Association's Minimum Standards of Judicial Independence adopted in New Delhi in October 1982, then followed by the Montreal Universal Declaration on the Independence of Justice, 1983, the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995 and the Bangalore Principles of Judicial Conduct, 2002. This inclusion of the two concepts of collective independence and internal independence in the expression 'independence of judiciary' as the component parts is considered as an important milestone in recent legal history. For, impartiality and freedom of individual judges is meaningless without the institutional independence of the judiciary including the powers and facilities' that are required to perform judicial independence functions.¹⁶

a) Substantive Independence

Substantive independence, which is also described as functional or decisional independence, means the independence of judges to arrive at their decisions in accordance with their oath of office without submitting to any kind of pressures- internal and external- but only to their own sense of justice and the dictates of law. As Erkki Juhani Taipale, an European Jurist, says that the judges in 'administering justice can only be subordinate to the law, and that only the law can influence the contents of the decisions made by [them] No other state authority, not even the highest, is allowed to influence the decisions made by the judicial

¹⁵ Pamela S Karlan, 'Two Concepts of Judicial Independence', (1999) 72 *Southern California Law Review* 535, at pp. 536, 558.

¹⁶ Guy Green, 'The Rationale and Some Aspects of Judicial Independence', (1985) 59 *Australian Law Journal* 135, at p. 135.

organ.’¹⁷ Thus a substantive independent judge is one who ‘dispenses justice according to law without regard to the policies and inclinations of the government of the day.’¹⁸ (Sir Ninian Stephens). The International Bar Association’s Minimum Standards of Judicial Independence defines substantive independence to mean that ‘in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.’¹⁹ The concept has been elaborated in the 1983 Universal Declaration on the Independence of Justice thus: ‘Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’²⁰ This elaboration has been echoed in the 1985 UN Basic Principles on the Independence of the Judiciary thus: ‘The Judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’²¹ The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995, also followed the 1983 Universal Declaration on the Independence of the Judiciary: ‘The judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source.’²²

The notion of substantive independence, which is considered as the kernel of judicial independence, had also received due recognition in the Constitutions of some of the countries of the world prior to the development of international norms in this regard. For example, the

¹⁷ Erkki- Juhani Taipale, ‘Judicial Independence from the Lawyer’s Point of View’, in *Report of the Symposium on the Independence of Judges and Lawyers* (Helsinki, Nov. 1980) at p. 118.

¹⁸ Ninian Stephen, ‘Judicial Independence- A Fragile Bastion’, in Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: the Contemporary Debate* (Dordrecht: Martinus Nijhoff, 1985) at p. 531.

¹⁹ Article 1(c), International Bar Association’s Minimum Standards of Judicial Independence, 1982.

²⁰ Article 2.02, the Universal Declaration on the Independence of Justice, 1983.

²¹ Article 2, UN Basic Principles on the Independence of the Judiciary, 1985.

²² Article 3(a), the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.

Constitution of Japan, which was adopted in 1946, provides that 'All Judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.'²³ Later, the Constitution of the Republic of Korea, 1981, provides that 'Judges shall rule independently according to their conscience and in conformity with the Constitution and law.'²⁴

Thus substantive independence means the independence of individual judges to perform actual decision-making task merely on the basis of their assessment of the facts- merit of the cases, and understanding of law in accordance with their oath of office without taking into account whatsoever any kind of inducement, pressure or threat from any quarter and without taking into account the policies and inclinations of the government of the day. Such a frame of mind can be demonstrated only by those judges, to use the words of Justice Bhagwati of the Indian Supreme Court, who are 'stern, stuff and tough fibre, unbending before power' and who can alone 'uphold the core principle of the rule of law which says 'Be you ever so high, the law is above you.'²⁵

b) Personal Independence

Personal independence, as mentioned earlier, corresponds to the traditional and central meaning of the independence of the judiciary. It 'means that judges are not dependent on Government in any way which might influence them in coming to decisions in individual cases.'²⁶ It has been defined by the 1982 International Bar Association's Minimum Standards of Judicial Independence as meaning 'that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive

²³ Article 76(3), the Constitution of Japan, 1946.

²⁴ Article 103, the Constitution of the Republic of Korea, 1981.

²⁵ *S. P. Gupta and others v President of Union of India*, AIR 1982 SC 149 at p. 672.

²⁶ J.A.G Griffith, *The Politics of the Judiciary* (London: Fontana, 1977) at p. 29.

control.’²⁷ Thus personal independence implies that the individual judges shall be independent of the political branches of the government, especially the executive in respect of the terms of judicial service including transfer, remuneration, pension and the security of tenure until or mandatory retiring age and should be ‘placed in a position where he has nothing to lose by doing what is right and little to gain by doing what is wrong.’²⁸

c) Collective Independence or Financial and Administrative Independence

Collective independence means the institutional, administrative and financial independence of the judiciary as a whole *vis-a-vis* other branches of the government, namely the executive and the legislative. It aims at virtually the abolition of the dominant role that the executive plays in the administrative and financial matters of the court at the central level. In other words, collective independence demands a much greater effective judicial participation in the administration of the courts including control over administrative personnel, maintenance of court buildings, preparation and formulation of its budget and allocation of resources. For, interference in the management of the judiciary as a whole by the executive has adverse impact on individual judges in performing their judicial functions. The collective independence of the judiciary is considered as an important means to protect and buttress the freedom of an individual judge in his decision-making from executive interference by way of administrative control. ‘The protections enjoyed by judges, including financial independence’ claimed by the Commonwealth Law Ministers in their meeting held in Kuala Lumpur, Malaysia in 1996, ‘are an important defence against improper interference and free the judiciary to discharge the particular responsibilities given to it within national constitutional frameworks.’ The Montreal Universal Declaration on the Independence of Justice has given emphasis on this important conceptual aspect of the judicial independence thus: ‘It shall be a

²⁷ Article 1(b), International Bar Association’s Minimum Standards of Judicial Independence, 1982.

²⁸ R.M. Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1954) at p. 486.

priority of the highest order, for the state to provide adequate resource to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.²⁹ The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995, stresses that 'The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the Judiciary, or in a body in which the Judiciary is represented and has an effective role.'³⁰ In this context, it is worthy of note that in 1993 the Courts Administration Act was passed in South Australia providing for the establishment of the State Courts Administration Council, independent of the control of the executive, consisting of the Chief Justice of the Supreme Court, the Chief Judge of the District Court and the Chief Magistrate of the Magistrate Court and associate members nominated by them³¹ with the responsibility of 'providing or arranging for the provision of the administrative facilities and services for participating courts that are necessary to enable those courts and their staff properly to carry out their judicial and administrative functions.'³² The Council's Chief Executive Officer, known as the State Courts Administrator, has been given the responsibility of the 'control and management of the Council's staff' and the 'management of property that is under the Council's care and management'³³, subject to the control and discretion of the State Courts Administration Council. This can serve as an important model for other democratic countries to follow in order to ensure the collective independence of the judiciary.

²⁹ Article 2.41, Montreal Universal Declaration on the Independence of Justice, 1983.

³⁰ Article 36, the Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.

³¹ Section 7, the Courts Administration Act, 1993.

³² Section 10(1), *ibid*.

³³ Section 15, *ibid*.

d) Internal Independence

Internal Independence of the judiciary means the independence of a judge from any kind of order, indication or pressure from his judicial superiors and colleagues in coming to decisions in individual cases. This means that the threat to judicial independence may not only come from outside, it may also come from inside- colleagues and senior judges. Thus a judge should not only be independent from the interference of the executive and legislative but also from his judicial colleagues and superiors, having administrative power and control, in deciding a case. Although the International Bar Association's Minimum Standards and Montreal Declaration expressly recognise the importance of the concept of internal judicial independence, the notion has received more elaboration and featured prominently in the text of the Montreal Declaration. While the International Bar Association's Standards of Judicial Independence merely says that 'In the decision-making process, a judge must be independent vis-a-vis his judicial colleagues and superiors'³⁴, the Montreal Universal Declaration on the Independence of Justice provides that 'In the decision-making process, judges shall be independent vis-a-vis their judicial colleagues and superiors. Any hierarchical organisation of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.'³⁵ In the same vein, the Beijing Statement of the Principles of the Independence of the Judiciary, 1995, provides: 'In the decision-making process any hierarchical organisation of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment.'³⁶ On the other hand, the UN Basic

³⁴ Article 46, International Bar Association's Minimum Standards of Judicial Independence, 1982.

³⁵ Article 2.03, Montreal Universal Declaration on the Independence of Justice, 1983.

³⁶ Article 6, the Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.

Principles on the Independence of the Judiciary, 1985 merely states that 'There shall not be any inappropriate or unwarranted interference with the judicial process.'³⁷

Thus, it is evident that only the International Bar Association's Minimum Standards recognise the four types of judicial independence- substantive, personal, collective and internal. Although the Montreal Universal Declaration in the Independence of Justice contains express provision concerning substantive and internal independence of the judges, it does not provide for personal independence of the judges and has implied reference to the collective independence of the judiciary. On the other hand, the UN Basic Principles of the Independence of the Judiciary recognise expressly only the substantive independence of the judges and contain merely implied reference to the internal independence of the judges. Although the Beijing Statement of the Principles of the Independence of the Judiciary in the LAWASIA Region, 1995 embodies explicit provision concerning substantive, internal, and collective independence of the judges, it does not contain any reference whatsoever to their personal independence. Thus, it is clear that all these international norms have uniform approach only in one aspect of the judicial independence, namely the substantive independence of the judges.

D. Importance of an Independent and Impartial Judiciary in a Democratic State

Although the concepts of 'independence' and of 'impartiality' are obviously related, they are separate distinct values. For, 'impartiality' refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case, 'Independence' reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others ... particularly to the executive branch

³⁷ Article 4, the UN Basic Principles on the Independence of the Judiciary, 1985.

of government.’³⁸ The importance of an independent judiciary can be gathered from the facts that as back as in 1776, the American revolutionaries listed the absence of judicial independence in the Declaration of Independence as one of the causes of their Revolution thus: ‘The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States ... He has made judges dependent upon his will alone, for the tenure of their offices and the amount of their salaries.’ However, the realities that the judiciary, which is charged with the ultimate decision over life, liberty, freedom, rights, duties and properties of citizens, is the weakest arm of the government and hold ‘... neither the sword nor the purse’ press the compelling necessity for the establishment of a competent, independent and impartial judiciary to i) uphold the rule of law, ii) ensure fair justice, iii) defend constitutional guarantees of fundamental rights and iv) to maintain and enhance public confidence in judicial impartiality, so that the legitimate aspirations of the citizens of a state are fulfilled.

i) Rule of Law

An independent judiciary is the essential- indeed indispensable- component of a free and democratic society³⁹ and the essence of a modern democracy is the observance of the rule of law; in other words, the maintenance of the rule of law is the hallmark of any democratic society. An enlightened, independent and courageous judiciary is, therefore, a fundamental requisite, a basic element for the very existence of any society that respects the rule of law as a subservient judiciary cannot be relied upon to accomplish the task of maintaining rule of law. If judicial independence exists in a democratic society, absolutism in government cannot

³⁸ The Supreme Court of Canada in *Walter Valente v Her Majesty the Queen*, (1985) 2 RCS 673.

³⁹ Francis J Larkin, ‘The Variousness, Virulence, and Variety of Threats to Judicial Independence’, (1997) 36 *Judges’ Journal* 1, at p. 7.

establish there; and where it is absent, absolutism is likely to have free rein.⁴⁰ For, it is the independent judiciary which 'stands between the subject and any attempted encroachments of his liberty by the executive, alert to see that any coercive action is justified in law.'⁴¹ Independent courts constitute the last bulwark of the citizen against the arbitrary encroachments of the state. Therefore, in 'all countries cases, sometimes civil, but more frequently criminal, arise which involve political issues and excite party feeling. It is then that the courage and uprightness of the judges become supremely valuable to the nation commanding respect for the exposition of the law which they have to deliver.'⁴²

The roots of the rule of law can only go deep into the society if the judiciary applies the law neutrally against the government and is not afraid of making unpopular decisions against powerful interests. To ensure the supremacy of law over the arbitrary exercise of power, to guarantee equal protection of law to all people without exception, and to maintain that legal decisions are based upon legal and factual merits rather than political interests or popular clamour, an enlightened, independent and courageous judiciary is indispensable so that a true civilised society proclaiming rule of law can be established and flourished. As Madison says: 'Independent tribunals of justice will consider themselves an impenetrable bulwark against every assumption of power in the Legislature or Executive.'⁴³ 'The importance of an independent judiciary' says Lord Hailsham, 'is not less but all the greater when judges have to serve under an all-powerful parliament dominated by a party cabinet, and concentrating all the powers, and more than all powers, of the executive and legislature combined in one coherent complex.'⁴⁴ In his oft-quoted judgment in the celebrated case of *Sharaf Faridi v the*

⁴⁰ M. Ershadul Bari, 'Importance of An Independent Judiciary', (1993) 4 *Dhaka University Studies Part-F* 1, at p. 10.

⁴¹ Lord Atkin in his memorable war-time dissent in *Liversidge v Anderson*, [1942] AC 206, at p. 244.

⁴² James Bryce, *supra* note 5, at 384.

⁴³ Quoted in John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca: Cornell University Press, 1984) at p. 25.

⁴⁴ Lord Hailsham, *The Door Wherein I Went* (London: Collins, 1975) at 245.

*Federation of Islamic Republic of Pakistan*⁴⁵, Saleem Akhter J. (then a Judge of the Sindh High Court) observed:

In a set-up where the Constitution is based on trichotomy of powers, the judiciary enjoys a unique and supreme position within the framework of the Constitution as it creates balance amongst the various organs of the State and also checks the excessive and arbitrary exercise of power by the Executive or the Legislature ... The jurisdiction and the parameters for exercise of powers by all three organs have been mentioned in definite terms in the Constitution. No organ is permitted to encroach upon the authority of the other and the Judiciary by its power to interpret the Constitution keeps the Legislature and the Executive within the spheres and bounds of the Constitution.⁴⁶

Modern governments necessarily pose a greater threat to individual liberties as they intervene in areas previously little regulated. The citizen must look primarily to the judiciary for redress if there is a denial of benefits to which a citizen is entitled or of unlawful interference with his freedom of action according to law. An independent and impartial judiciary can only determine whether the executive actions challenged were exercised outside the provisions of the constitution and other laws of the country. In addition to reviewing executive actions, such a judiciary can also determine, by reference to the constitution, the validity of challenged legislation remaining unaffected either by the policy or the wishes of the government of the day. With regard to the practice as well as wide scope of judicial review of executive action and of legislation in the USA, where the Supreme Court in 1803 assumed power of judicial review in the case of *Marbury v Madison*⁴⁷, Erwin N. Griswold commented, 'in the United States there is scarcely any sort of government action, or threatened

⁴⁵ PLD 1989 Karachi 404.

⁴⁶ *Ibid.*, at 444.

⁴⁷ [1803] 5 US 137.

government action, which is not subject to judicial review. America has indeed moved a long way in the direction of government by the judiciary.⁴⁸

ii) Fair Justice

It is aptly said that 'Ideas, ideals and great conception are vital to a system of justice, but it must have more than that- there must be delivery and execution. Concepts of justice must have hands and feet or they remain sterile abstractions.'⁴⁹ Without a free and independent judiciary, ready to adjudicate between individuals and between the state and individual in an impartial manner, justice, indeed, is a meaningless word. 'There is no better test of the excellence of a government', rightly says James Bryce, 'than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice if the Law be dishonestly administered, the salt has lost its savour; if it be weakly or fitfully enforced, the guarantees or order fail, for it is more by the certainty than by the severity of punishment that offences are repressed. If the lamp of justice goes out in darkness, how great is that darkness!'⁵⁰ Referring to the importance of an independent judiciary in ensuring fair justice, Henry Sidgwick, has gone so far as to say that 'in determining a nation's rank in political civilization, no test is more decisive than the degree in which justice as defined by the law is actually realized in its judicial administration; both as between one private citizen and

⁴⁸ Erwin N. Griswold, 'The Judiciary and the Government', a paper presented at the Second International Conference of Appellate Judges, Australia, 20 May 1980, at p. 28.

⁴⁹ Chief Justice Warren Burger, 'Address to the American Bar Association', San Francisco, Reported in Vital Speeches, 1 October 1972; cited in Justice Michael Kirby, Independence Of The Legal Profession: Global And Regional Challenges, a paper presented at the Presidents of Law Association In Asia Conference, Law Council of Australia, Queensland, Australia, 20 MARCH 2005 <
http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_20mar05.html> (accessed on 10 August 2009).

fundamental freedoms without any discrimination. Since the adoption of the Universal Declaration of Human Rights in December 1948, the international community has made considerable progress towards the incorporation, promotion, and development of transnational jurisprudence of substantive human rights along with the principle of judicial independence embodied in a good number of global and regional conventions on human rights. Effective mechanisms for the enforcement of human rights in the national, regional and international systems of justices are a fundamental requisite as without such mechanisms human rights will remain unfulfilled injunctions in the constitutions or in the regional and international conventions. 'An impartial judiciary composed of competent judges is the best guarantee of proper administration of justice, and in the final analysis, of defense of human rights.'⁵⁴ Thus, the 1948 Universal Declaration of Human Rights, with which began the real history of human rights at the level of international law, provides that: 'Everyone has the right to an effective remedy by the competent national tribunal for acts violating the Fundamental Rights granted to him by Constitution or by law'⁵⁵ and enshrines the principle of the independence of the judiciary thus: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'⁵⁶ Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 provides that 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'⁵⁷ Later in 1966, the International Covenant on Civil and Political Rights guarantees that all person shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law,

⁵⁴ Annual Report of the Inter-American Commission of Human Rights, 1985, at p. 182.

⁵⁵ Article 8, the Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948, A/810.

⁵⁶ Article 10, *ibid*.

⁵⁷ Article 6(1), the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, CETS 005.

everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.⁵⁸ The American Convention on Human Rights, 1969, also invest every person with 'the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, in the substantiation of any accusation of a criminal nature made against him, or for the determination of his rights and obligations of a civil or any other nature.'⁵⁹ The latest regional convention on human rights, the African Charter on Human and Peoples' Rights, 1981, in a similar manner states that 'Every individual shall have the right to have his cause heard. This comprises: a) the right to an appeal to competent national organs against the acts of violating his fundamental rights as recognised and guaranteed by conventions [and] laws d) the right to be tried within a reasonable time by an impartial court or tribunal.'⁶⁰

Thus the incorporation of the principle of judicial independence into the global and regional human rights law jurisprudence demonstrates the realisation of the international community to the effect that the independence and impartiality of courts is essential to the effective upholding of constitutional guarantees of human rights. Various international organisations such as the International Commission of Jurists' Standards on Judicial Independence adopted in Athens (Greece) in 1955, in New Delhi in 1959, in Lagos (Nigeria) in 1961, in Rio de Janeiro (Brazil) in 1962, in Bangkok (Thailand) in 1965, and in Caracas (Venezuela) in 1989, International Bar Association's Minimum Standards of Judicial Independence (adopted in New Delhi), 1982, the Montreal Universal Declaration on the Independence of Justice, adopted in Montreal by the First World Conference on the Independence of Justice, 1983, the United Nations Basic Principles on the Independence of the Judiciary, 1985, the Law Association of Asia and the Western Pacific's (LAWASIA) Tokyo Principles on the

⁵⁸ Article 14(1), the International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

⁵⁹ Article 8(1), the American Convention on Human Rights 1969, 1144 UNTS 123.

⁶⁰ Article 7, the African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 21.

Independence of the Judiciary in the LAWASIA Region, 1982 and the Beijing Statement on the Principles of the Independence of Justice, 1995, the Harare Declaration of the Commonwealth, the Bangalore Principle's of Judicial Conduct, the Latimer House Guidelines and the Suva (Fiji) Statement on the Principles of Judicial Independence and Access to Justice, 2004 have also given emphasis on the truth that the constitutional guarantees concerning fundamental rights can only be upheld and protected through a competent, independent and impartial judiciary.⁶¹ The establishment of the Office of the United Nations Special Rapporteur on the Independence of Judges and Lawyers in 1994 is a glaring testimony/example of international community's recognition of the need to protect and strengthen the independence of the judiciary as a central tenet of the international human rights law of great practical importance.

iv) Public Confidence in Judicial Impartiality

The Judiciary, which is the last hope of the citizen, contributes vitally to the preservation of the social peace and order by settling legal disputes and thus promotes a harmonious and integrated society. The quantum of its contribution, however, largely depends upon the willingness of the people to present their problems before it. What matters most, therefore, is the extent to which people have confidence in judicial impartiality.⁶² Credibility in the functioning of the justice delivery system and the perception of the aggrieved parties that the judicial power is exercised impartially in the right perspective are relevant considerations to ensure the continuance of public confidence in the independence of the judiciary. Justice Pathak has portrayed this dimension beautifully in his observation in *S. P. Gupta v Union of India*⁶³ thus:

⁶¹ M. Ershadul Bari, *Judicial Independence: National and International Perspectives* (Unpublished Book).

⁶² M. Ershadul Bari, *supra* note 40, at p. 8.

⁶³ (1981) Supp SCC 87; AIR 1982 SC 149.

Public confidence in the administration of justice is imperative to its effectiveness, because ultimately the ready acceptance of a judicial verdict alone gives relevance to the judicial system. While the administration of justice draws its legal sanction from the Constitution, its credibility rests in the faith of the people. Indispensable to that faith is the independence of the judiciary. An independent and impartial judiciary supplies the reason for the judicial institution, it also gives character and content to the constitutional milieu.⁶⁴

Thus judicial independence encourages tranquillity and harmony in society by ensuring litigants that their claims are determined fairly by the courts. As it was commented that: 'The value of the courts as an important impartial forum for the resolution of disputes depends upon the public perception of the independence of the courts from the parties and particularly their independence from the government.'⁶⁵ Thus without public confidence, the effective functioning of the judiciary is almost impossible. 'The confidence of the people is the ultimate reliance of the Court as an institution.'⁶⁶ It is the most important element to retain the authority of the judiciary. In fact, the 'independence of the judiciary lends prestige to the office of a judge and inspires confidence in the general public.'⁶⁷ 'Nothing does' says James Bryce, 'more for the welfare of the private citizen, and nothing more conduces to the smooth working of free government than a general confidence in the pure and efficient administration of justice between the individual and the State as well as between man and man.'⁶⁸ In the words of a distinguished Justice of the US Supreme Court: 'The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgments and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly; they are the products of time and

⁶⁴ Ibid., at 705.

⁶⁵ Ontario Ministry of Attorney General, 'White Paper on Courts Administration', 1976, at p. 13.

⁶⁶ Felix Frankfurter, 'The Supreme Court in the Mirror of Justice', (1957) 105 *University of Pennsylvania Law Review* 781, at p. 796.

⁶⁷ W.A. Robson, *Justice and Administrative Law* (London: Stevens, 1951) at p. 47.

⁶⁸ James Bryce, *supra* note 5, at p. 389.

experience. But they flourish when judges are independent and courageous.⁶⁹ Misconduct by any judge undermines public confidence in the administration and purity of justice and also damage public respect for the rule of law and, as such, a 'judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.'⁷⁰ If the judiciary fails to retain public confidence, its legitimacy would ultimately be threatened. In fact, the significance of public perception in the judiciary is well reflected in the oft quoted maxim that 'Justice must not only be done, but must also be seen to be done.' It implies that 'A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.'⁷¹ This point has further been elaborated by the Bangalore Principles of Judicial Conduct, 2002, thus:

A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.⁷²

A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.⁷³

The two basic principles of natural justice-impartially and fairness of the proceedings- apply for self-disqualification for bias. The rule does not require that bias has actually influenced the judge, but rather that it is likely that it will influence the judges. Thus public perception is

⁶⁹ William O Douglas, 'From Marshal to Mukharjee: Studies in American and Indian Constitutional Law' (Tagore Law Lectures, 1956) at p. 345.

⁷⁰ Article 1.6, the Bangalore Principles of Judicial Conduct, 2002.

⁷¹ Article 2.4, *ibid.*

⁷² Article 4.8, *ibid.*

⁷³ Article 4.9, *ibid.*

one of the fundamental values of the administration of justice.⁷⁴ Thus public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.⁷⁵ Judiciary's very existence, authority, strength and prestige, indeed, depend entirely upon the confidence reposed in it by the public.

It should be kept in mind that judicial independence is something which must never be taken for granted, and like freedom, exacts the price of eternal vigilance.⁷⁶ The tyranny of an autocratic regime may not be as dangerous and harmful to the public welfare as the independence of citizens in a democratic state. Public opinion is a better safeguard for the independence of judges than laws and constitutional guarantees. In the long run, the manner in which judges perform their duties can build up public opinion for the courts. The public, particularly the lawyers and all sections of civil society, will support the courts if they are seen as an effective impartial forum for dispensation of justice.⁷⁷ Henry Cecil says 'Justice is such a precious commodity that everything reasonable [on the part of the public] should be done to attain the highest standard' as judges do not live in 'ivory tower protected against tides in the affairs of men' (Benjamin Cardozo). He (Henry Cecil J) also added a rider that 'if the public does not want to pay for more expensive articles, it can have the cheaper.'⁷⁸ An impartial administration of justice 'is like oxygen in the air, they [the people] know and care nothing about it until it is withdrawn.' (Lord Atkin).

E. The Constitution of Malaysia and the Independence of Superior Courts

Malaysia, literally means land of the Malay people who constitute 50% of the total population (about 28 million), is a country in Southeast Asia with a total land area of 329,748,000 km (66th largest country) separated by the South China Sea into two regions,

⁷⁴ M. Ershadul Bari, *supra* note 40, at p. 10.

⁷⁵ The Bangalore Principles of Judicial Conduct, 2002, at preambular para 6.

⁷⁶ M. Ershadul Bari, *supra* note 40, at p. 10.

⁷⁷ *Ibid.*, at p. 11.

⁷⁸ Cecil Henry, *The English Judge* (London: Stevens and Sons, 1970) at p.113.

Peninsular Malaysia and Malaysian Borneo (also known as East Malaysia consisting of two states of Sabah and Sarawak). The 11 territories of peninsular Malaysia joined together to form the Federation of Malaya in 1948 and eventually gained independence from the British on 31 August 1957. The decolonised Singapore, Sarawak and British North Borneo (now known as Sabah) joined the Federation of Malaya on 16 September 1963 and the newly formed 14- State Federation was named as Malaysia. Malaysia has subsequently been comprised of 13 States since 1965, when Singapore left the Federation of Malaysia, and of three Federal Territories of Kuala Lumpur (capital city), Putrajaya (the new government administrative centre) and the island of Labuan (situated near Sabah). Malaysia borders Thailand, Indonesia and Brunei.⁷⁹

The Constitution of the Federation of Malaya, which was drafted by the Independent Constitutional Commission chaired by Lord Reid of the United Kingdom⁸⁰, came into force on the *Merdeka* Day, 31 August 1957, and subsequently after passing the Malaysia Act, 1963, to amend Article 1(1) and 1(2) of the 1957 Constitution to provide for, *inter alia*, the admission of the three new States and the renaming of the Federation as Malaysia, the Constitution was introduced as the Constitution of Malaysia on 16 September 1963, the Malaysia Day.⁸¹

The first Prime Minister of the Federation of Malaya, and Malaysian *Bapa Kemerdekaan* (Father of Independence), Tunku Abdul Rahman, in his 'Proclamation of Independence' on 31 August 1957 at *Merdeka* Stadium (Kuala Lumpur) declared that the new Federation 'shall

⁷⁹ US Department of State, *Background Note: Malaysia* <http://www.state.gov/r/pa/ei/bgn/2777.htm> (accessed on 21 June 2010); Wikipedia, *Malaysia* <<http://en.wikipedia.org/wiki/Malaysia>> (accessed on 21 June 2010).

⁸⁰ The other members of the Independent Constitutional Commission were Sir Ivor Jennings (United Kingdom), Sir William Mckell (Australia), B. Malik (India) and Justice Abdul Hamid (Pakistan). At the last moment, the Canadian nominee withdrew.

⁸¹ Tunku Sofiah Jewa, Salleh Buang and Yaacob Hussain Merican (eds), *Tun Mohammed Suffian's An Introduction to the Constitutional of Malaysia*, 3rd edn (Petaling Jaya, Selangor: Pacifica Publications, 2007) at pp. 11-14.

be forever a sovereign democratic and independent State founded upon the principles of liberty and justice.’⁸² But the basic objectives and principles- democratic way of life and upholding the Constitution and Rule of Law- constituting the *Rukunegara* (result of lengthy deliberations in the representatives of political parties and other interests⁸³) have not been incorporated into the Constitution of Malaysia as Directive Principles of Policy, as have been done in the 1949 Indian Constitution or as the Fundamental Principles of State Policy included in the 1972 Constitution of Bangladesh.

The Malaysian Constitution does not even contain a preamble, which contains in essence the basic philosophy of the constitution (i.e. ideals and aspirations of the people) and is the key to open the mind of the framers to find out the general purpose for which they made the several provisions of the Constitution⁸⁴, as it is to be found in the Constitution of Bangladesh. The Preamble to the Constitution of Bangladesh provides, *inter alia*, that: ‘it shall be a fundamental aim of the State to realise through the democratic process a socialist society, free from exploitation- a society in which the *rule of law, fundamental human rights and freedom, equality and justice*⁸⁵ will be secured for all citizens.’⁸⁶

Judiciary is, among the trinity of the government, to use the language of Montesquieu ‘next to nothing’⁸⁷ and its importance is ‘rather profound than prominent’⁸⁸ having the judicial power under the Constitution to decide controversies between citizens, or between citizens and state, and ‘declare all acts contrary to the manifest tenor of the Constitution void.’⁸⁹

Hence, judicial power of the Federation of Malaya was vested in a Supreme Court (consisting

⁸² H P Lee, ‘Constitutional Heads and Judicial Intervention’, in Wu Min Aun (ed), *Public Law in Contemporary Malaysia* (Selangor: Addison Wesley Longman Malaysia Sdn. Bhd., 1999) at p. 5.

⁸³ Ibid., at pp. 5-6.

⁸⁴ The Supreme Court of India in *Re Berubari's Case*, AIR 1960 SC 845.

⁸⁵ Italics added.

⁸⁶ The Constitution of Bangladesh, 1972, at preambular para 3.

⁸⁷ Montesquieu, *supra* note 9, at p. 186.

⁸⁸ Henry Sidgwick, *supra* note 51, at p. 481.

⁸⁹ Alexander Hamilton, *supra* note 3, at p. 465.

of a High court and a Court of Appeal) and the inferior courts⁹⁰ (established under the federal law) by the original Federal Constitution, 1957 in the same manner as legislative power was vested in Parliament⁹¹ and executive power of the federation was vested in the Yang di – Pertuan Agong (King)⁹² in line with the doctrine of separation of powers. When the Federation of Malaysia was formed on 16 September 1963, the Part IX of the Constitution was amended to restructure the superior courts and under the amended Article 121(1) the judicial power of the Federation was vested in the three High Courts (as a result of the breaking away of Singapore from the Federation of Malaysia on 9 August 1965, the number of High Court stands at two) of coordinate jurisdiction and status, namely the High Court in Malaya, the High Court in Borneo and the High Court in Singapore. Amended Article 121(2) provided for the establishment of the Federal Court as the apex court replacing the existing Supreme Court giving exclusive jurisdiction to determine appeals from the decisions of a High Court and such original or consultative jurisdiction. Thus the newly established Federal Court in reality took the place of the Court of Appeal of the abolished Supreme Court. But the Constitutional (Amendment) Act, 1983, which provided for the abolition of all appeals in civil matters (appeals in criminal and constitutional matters were abolished in January 1978) from Malaysian Federal Court to the Privy Council in London by repealing Article 131 of the Constitution with effect from 1 January 1985, contained provision to establish on the same day the Supreme Court of Malaysia in place of the Federal Court as the final court of appeal and the highest court of the land.⁹³ Two years later in 1987 the Supreme Court observed in *Public Prosecutor v Dato' Yap Peng*⁹⁴ that 'judicial power to transfer cases from a subordinate court of competent jurisdiction as presently provided by S. 418A cannot be

⁹⁰ Article 121(1), the Original Federal Constitution of Malaya.

⁹¹ Article 44, *ibid*.

⁹² Article 39, *ibid*.

⁹³ Tun Dato Seri Abdul Hamid Omar, *The Judiciary in Malaysia* (Kuala Lumpur: Asia Pacific Publications Sdn. Bhd., 1994) at pp. 18-21.

⁹⁴ [1987] 2 MJJ 311 SC.

conferred on any organ of government other than the judiciary.’ The Supreme Court held that 121(1) of the Constitution, which then provided, as mentioned earlier that the judicial power of the Federation was vested in the two High Courts and such inferior courts as might be provided by federal law. It seems that the decision incurred the displeasure of the Government; an amendment to Article 121 of the Constitution was passed in 1988 to remove the reference to vesting of the judicial power of the Federation in two High Courts of coordinate jurisdiction and status; the amended Article merely provided: ‘There shall be two High Courts of coordinate jurisdiction and status’

The abolishing of any reference to the vesting of the judicial power of the Federation of Malaysia in the Constitution in 1988 reminds us that the framers of the Constitution of Bangladesh in 1972 had not even vested the judicial power in the Supreme Court and subordinate courts in any of the Articles, from 94 to 117, of Part VI titled the Judiciary although they conferred the executive power of the Republic on the Prime Minister⁹⁵ (not the Head of the State- President) and entrusted the legislative powers of the Republic in the Parliament- the House of the Nation.⁹⁶ Since judicial power has not been vested in any other authority, the judiciary of Bangladesh exercises its exclusive and inherent jurisdiction of judicial power including reviewing executive acts and Acts of Parliament. For example, in *Anwar Hossain Chowdhury and others v Bangladesh*⁹⁷, the Appellate Division of the Bangladesh Supreme Court declared the establishment of six permanent Branches of the High Court Division by amending Article 100 of the Constitution under the Constitution (Eight Amendment) Act, 1988, *ultravires* and invalid.

It seems inconsistent that although the reference to vesting of judicial power of the Federation in the two High Courts and the inferior courts was abolished in 1988 by an amendment to the

⁹⁵ Article 55(2), the Constitution of Bangladesh, 1972.

⁹⁶ Article 65(1), *ibid*.

⁹⁷ 41 DLR (AD) (1989) 165.

Constitution, amended Article 121 of Part IX still contains the heading 'Judicial Power of the Federation' and there is no explicit reference of investing the judicial power in the two High Courts and inferior courts mentioned in that Article. It appears that amended Article 121 makes the jurisdiction and powers of the High Court dependent upon in fine on federal law that may be passed by Parliament from time to time. In other words, under the new arrangement the High Court has been deprived of the constitutionally entrenched original jurisdiction and its original source of power- the constitution- has been replaced with the Federal Legislature in contrary to the commencing constitutional scheme and the doctrine of separation of powers. Thus the equal status of judiciary with the legislative and executive has been eroded by the amended Article. Still it can safely be said that the doctrine of separation is a basic pillar of the Constitution of Malaysia although the reference to vesting of judicial power of the Federation in the two High Courts was abolished in 1988 by an amendment to the Constitution. The judicial power including the protection of the fundamental liberties and interpretation of, as well as maintaining the supremacy of the Constitution of Malaysia are being exercised by the superior courts of the country.⁹⁸

However, in 1994 the Constitution of the Federation of Malaysia was amended to set up from 24 June 1994 the Court of Appeal as an intermediary court (between the Federal Court and the High Courts) and to rename the Supreme Court as the Federal Court- the final court of appeal for Malaysia. Thus the present structure of the superior courts of Malaysia under the Federal Constitution is as follows:

⁹⁸ For example, in connection with the liberty of the person, Article 5(2) of the Malaysian Constitution provides that 'where complain is made to a High Court or any judge thereof that a person is being unlawfully detained, the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.' On the other hand, as regards the interpretation of the Constitution, Article 128(1) provides that 'The Federal Court shall, to the exclusion of any other court have jurisdiction to determine- a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case, the Legislature of the State has no power to make laws.' See *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor*, [1998] 3 MLJ 289(CA).

1. the Federal Court (the highest court of the land)
2. the Court of Appeal (as an intermediary court between the Federal Court and the High Courts), and
3. the High Court of Malaya and the High Court of Sabah and Sarawak.

Prior to the name change in 1994, the head of the Supreme Court was titled 'Lord President' and the title of 'Chief Justice' was held by the head of the High Court in Malaya and the High Court in Borneo respectively. But after the amendment of 1994, when the Supreme Court was renamed the Federal Court, the office of Lord President of the Supreme Court was replaced by that of 'Chief Justice of Malaysia', while the Chief Justices of Malaya and Borneo were retitled 'Chief Judge of Malaya' and 'Chief Judge of Sabah and Sarawak.' These name changes appear to be a deliberate attempt to downgrade the position, prestige and image of the Malaysian Judiciary.

However, it is true that unlike the Constitution of Bangladesh (the Constitution of the USA and the Constitution of India), the Constitution of Malaysia, as mentioned earlier, does not contain a preamble to incorporate into it the aspirations of justice and liberty, neither does it contain a Part titled the Fundamental Principles of State Policy like the Constitution of Bangladesh, Directive Principles of State Policy like the Constitution of India incorporating into it an Article (as it has been done in Article 22 of the 1972 Constitution of Bangladesh and Article 50 in the Indian Constitution) providing that the 'State shall ensure the separation of the judiciary from the executive organs of the State' to demonstrate clearly the intent of the constitution makers to safeguard the judiciary from any form of executive control or interference. Furthermore, unlike the Constitution of Bangladesh, which in Article 94(4) categorically provides for the independence of the Chief Justice and other Judges of the Supreme Court, consisting of the High Court Division and the Appellate Division, in the exercise of their judicial functions and in Article 116A speaks of the independence of the

Subordinate Judicial Officers and Magistrates exercising functions in discharging their judicial duties, there are no Articles in the Constitution of Malaysia dealing with expressly the principle of the independence of the judiciary to show that it is very much a basic pillar or basic structure in the scheme of the Constitution. Even the oath to be taken by the judges of superior courts, as mentioned in Sixth Schedule, does not contain a promise 'to do right to all manner of people according to law, without fear or favour, affection or ill-will'- the core principle of the independence of the judiciary- as is to be found in Third Schedule of the Constitution of Bangladesh.

However, a judge of the superior court is required to take an oath or make an affirmation that he will 'faithfully discharge' his 'judicial duties in that office' to the best of ... [his] ability, that he 'will bear true faith and allegiance to Malaysia, in connection with the liberty of the person, and will preserve, protect and defend its constitution.'⁹⁹ Since the oath speaks of discharging judicial duties 'faithfully', it may be strongly argued that this has the reference to performing judicial functions with loyalty, trustworthiness and unwaveringly, to use the words of Sir Gerard Brennan, who in 1995 in his swearing-in speech as Chief Justice of the High Court of Australia commented on the judicial oath, 'it commands independence from any influence that might improperly tilt the scale of justice. When the case is heard, the judge must decide in the lonely room of his or her own conscience but in accordance with law.'¹⁰⁰ In the words of Raja Azlan Shah, who had a distinguished career in Government service before becoming a judge and rising to be Lord President of the Federal Court and sometime after his retirement first became the Sultan of Perak and then the Yang di-Pertuan Agong of Malaysia, judges 'are lions under the throne' but that seat is occupied in their eyes not by Kings, Presidents or Prime Minister but by the law and their conception of the public interest.

⁹⁹ 'Sixth Schedule. Forms of Oaths and Affirmation', The Federal Constitution of Malaysia.

¹⁰⁰ (1995) 183 CLR IX at X; cited in HP Lee, 'The Malaysian Constitution after 50 years- Retrospective, Prospective and Comparative Perspectives', (2007) 9 *Australian Journal of Asian Law* 307 at p. 311.

It is to that law and to that conception that they owe their allegiance. In that lies their strength.'¹⁰¹ Furthermore, oath of judges also states that he will 'bear true faith and allegiance to Malaysia' which implies that their allegiance are not to the Head of the State, Head of the Government, ministers or the Parliament and, as such, unlike the civil servants, do not take any orders particularly from the executive. As Article 132(3)(c) of the Constitution of the Federation of Malaysia states that: '3. The public service shall not be taken to comprise- c) the office of judges of the Federal Court, the Court of Appeal or a High Court;'

However, although the Constitution of the Federation of Malaysia does not contain the expression 'independence of the judiciary' or words performing the judicial functions independently, as mentioned earlier, there are several provisions in the Constitution designed to secure the independence of the judges of superior courts- the Federal Court, the Court of Appeal and the High Court- under the Federal Constitution of Malaysia so that they can discharge their duties without fear or favour.

Since **the substantive independence of the judges of the Malaysian Superior Courts, with which the present comparative study is concerned**, is inextricably linked with the method of appointment, the constitutional provisions relating to it will be discussed in the second. In this chapter, only those provisions of the Constitutions of Malaysia and Bangladesh would be discussed which are aimed at to further enhance the independence of judges of superior courts of Malaysia and Bangladesh.

In the **first place**, a very significant provision concerning the discussion of the conduct of judges in the Parliament has been contained in Article 127 of the Constitution which provides that:

¹⁰¹ These comments were made in a public lecture in 1986 at the University Sains Malaysia in Penang which have been quoted in HRH Sultan Azlan Shah, *Constitutional Monarchy, Rule of Law and Good Governance* (Kuala Lumpur: Professional Law Books & Sweet Maxwell Asia, 2004) at p. 59.

The conduct of a judge of the Federal Court, Court of Appeal or High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State.

It seems that the provision of serving notice of a substantive motion to discuss the conduct of judges of superior courts only in the Federal Parliament, not in any State Legislative Assembly, by at least one quarter of the number of members of the House concerned is aimed at to prevent raising sudden and indiscriminate questions about them in Parliament which may cause embarrassment to the judges concerned or affect the public confidence in the judiciary.

Secondly, in order to ensure the dignity and honour of the Judges of the Federal Court, the Court of Appeal and the High Court, the Federal Constitution has given them the 'power to punish any contempt of itself.'¹⁰² In this context, in *Attorney- General and Others v Arthur Lee Meng Kuang*¹⁰³, the then Supreme Court in 1987 aptly observed:

In this country the need to protect the dignity and integrity of the Supreme Court and the High Court is recognised by Article 126 of the Federal Constitution and also by Section 13 of the Courts of Judicature Act, 1964. A proper balance must therefore be struck between the right of speech and expression as provided for in Article 10 of the Federal Constitution and the need to protect the dignity and integrity of the superior courts in the interest of maintaining public confidence in the Judiciary.

Third and finally, since the power to reduce salaries and privileges of judges is by its nature a threat to attack on the judicial independence, like many states of the world¹⁰⁴ Malaysia

¹⁰² Article 126, the Federal Constitution of Malaysia.

¹⁰³ [1987] 1 MLJ 206.

¹⁰⁴ For example, Article III S. 1, the Constitution of the USA, 1787, Article 147(2) & (4e), the Constitution of Bangladesh, 1972, Article 125, the Indian Constitution, 1949.

stipulates prohibition on reduction of judicial salaries entrenched first in its Constitution and then in Judges (Remuneration) Act, 1971. The Constitution of Malaysia provides that 'The remuneration and other terms of office (including pension rights) of a judge of the Federal Court shall not be altered to his disadvantage after his appointment.'¹⁰⁵ It should be stressed here that the remuneration of judges as provided by the Judges (Remuneration) Act, 1971, enacted in pursuance of this Constitutional provision, is charged on the Fund, and, as such, is not subject to annual Parliamentary debate as it does not require annual Parliamentary approval for the allocation of fund. However, it should be mentioned here that the traditional or statutory guarantee regarding the remuneration of judges is no longer effective if there is no timely or automatic adjustment of judicial salaries in the face of rapid inflation.¹⁰⁶

F. The Constitution of Bangladesh and the Independence of Superior Judiciary

Bangladesh, which is a low-lying riparian country located in South Asia having a total land area of 147, 570 square kilometres and a population of 150 million (July 2007 CIA estimation), emerged as an independent State on 16 December 1971 following a nine-month bloody liberation war which began after Pakistan Army's crackdown on the inhabitants of erstwhile East Pakistan on the night of 25 March 1971.¹⁰⁷ It is the world's third largest Muslim majority and seventh most populous country having 88.3% Muslim population and

¹⁰⁵ Article 125(7), the Federal Constitution of Malaysia.

¹⁰⁶ Supra note 61.

¹⁰⁷ During twenty-five year union with former Pakistan, which became an independent Dominion after partitioning of the British India on 14 August 1947, Bangladesh (first as East Bengal from 1947 to 1956, and then as East Pakistan from 1956 to 1971) witnessed the move to declare Urdu as the sole State language of Pakistan bypassing Bengali (since 1988 called Bangla) the language of the majority population, dismissal of the 1954 democratically elected provisional government, greater discrimination in the recruitment and promotions in the civil services and armed forces, massive economic disparity between East and West Pakistan and increased suppression on the political parties.

98% Bangali (i.e. who speak Bangla) population. Bangladesh borders with India on three sides- north, east and west- and with Burma and the Bay of Bengal on the south side.¹⁰⁸

It should be mentioned here that the independence of Bangladesh was declared officially on 10 April 1971 by issuing the 'Proclamation of Independence' which had been deemed to have come into effect from 26 March 1971. Although the instrument 'Proclamation of Independence' confirmed the declaration of independence already made on 26 March 1971, it contained 'provisional arrangements' for the governance of the People's Republic of Bangladesh. It provided that 'till such time as a Constitution is framed,' the President would 'exercise all the Executive and Legislative powers of the Republic including the power to grant pardon.' This vesting of legislative power in the hands of the President instead of the Constituent Assembly (consisting of people's representatives elected from 7 December 1970 to 17 January 1971) empowered 'to frame' the Constitution of the country, was indeed contrary to the doctrine of separation of powers. Furthermore, the previous example set by the British in the Subcontinent under the Indian Independence Act, 1947 to allow the Constituent Assemblies of Pakistan and India to act as the central legislatures for both the Dominions until new constitutions were framed, was not adhered to. However, the Proclamation of Independence, which is considered as the first interim Constitution of Bangladesh, was not only silent as to the exercise of judicial powers but also did not provide for the creation of a superior court for Bangladesh. About a month after the independence of Bangladesh, on 11 January 1972, the Provisional Constitution of Bangladesh Order, 1972 was issued in pursuance of the Proclamation of Independence which provided for the establishment of a High Court, not Supreme Court, as the highest court of Bangladesh. The Provisional Constitution merely provided that the High Court would consist of 'a Chief

¹⁰⁸ US Department of State, *Background Note: Bangladesh* <http://www.state.gov/r/pa/ei/bgn/3452.htm> (accessed on 3 March 2010). Jalal Alamgir, 'Bangladesh's Fresh Start', (2009) 20 *Journal of Democracy* 41 at p. 41.

Justice and so many other Judges as may be appointed from time to time.’¹⁰⁹ It was silent as to the authority who would appoint the Judges of the High Court and on what terms and conditions they should hold the office. This lacuna was removed by the High Court of Bangladesh Order (President’s Order No. 5 of 1972) issued on 17 January 1972, only six days after the issuance of the Provisional Constitution of Bangladesh Order. It provided that the President would appoint the Chief Justice and other Judges of the High Court from time to time ‘who shall hold office on such terms and conditions as the President may determine.’¹¹⁰ Thus the President was not only given the power to appoint Chief Justice and other Judges of the High Court, he was also given the authority to determine terms and conditions of their service in accordance with the advice of the Prime Minister. This left the door too wide open in appointing the judges of the High Court for measuring their fitness in terms of political eminence and closeness to the ruling party rather than judicial qualities and if such persons were appointed as judges, they could hardly be expected to administer justice without fear or favour especially when the executive itself was a litigant. As a result of the aforesaid provision, the Chief Justice of the erstwhile ‘Dacca’ High Court¹¹¹ and another four senior judges¹¹² were not reappointed in the newly established High Court of Bangladesh without assigning any reason whatsoever which is contrary to the international norms developed in this regard thus: ‘.... Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointment to another judicial office of equivalent status and tenure’¹¹³ It seems that the President did not consider these five judges as persons who shared their philosophy or ideology and, as such, dropped them unceremoniously ignoring their competence, integrity, seniority and

¹⁰⁹ Article 9, the Provisional Constitution of Bangladesh Order, 1972.

¹¹⁰ Article 3, the High Court of Bangladesh Order, 1972.

¹¹¹ Justice B. A. Siddiqui was the Chief Justice of erstwhile Dhaka High Court.

¹¹² The other four judges who were dropped are Maksumul Hakim, Abdul Hakim, Nurul Islam and T. H. Khan.

¹¹³ Article 29, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995.

experience. However, the High Court of Bangladesh was given 'all such original, appellate, special, revisional, review, procedural and all other power as were exercisable in respect of the ... territories [of Bangladesh] by the High Court at 'Dacca' under any law in force before the 26th day of March, 1971.' About seven months after the issuance of the High Court of the Bangladesh Order, necessity was felt to provide for an Appellate Division of the High Court to deal with all 'appeals and petitions, which immediately before the commencement of the Provisional Constitution of Bangladesh Order, 1972, were pending before the erstwhile Supreme Court of Pakistan arising out of matters within the territories of Bangladesh.'¹¹⁴ Accordingly the High Court of Bangladesh (Amendment) Order (President Order No. 91 of 1972) was issued on 2 August 1972, which provided that 'There shall be an Appellate Division of High Court of Bangladesh which shall consist of the Chief Justice and two other Judges to be appointed by the President after consultation with the Chief Justice.'¹¹⁵ Thus the President's, who could not reasonably be expected to know the members of the bar properly as to assess their qualities, power of appointment was safeguarded by the mandatory consultation with Chief Justice who were in the best possible position to assess the probable fitness of the men likely to prove successful on the bench. However, the High Court of Bangladesh with its Appellate Division remained in force until the Supreme Court was established under the Constitution of Bangladesh which was adopted, enacted and given to the citizens of Bangladesh by the Constituent Assembly on 4 November 1972, only 325 days after the liberation, and was given effect from 16 December 1972 to commemorate the First Anniversary of the Victory Day of Bangladesh (marking the defeat of the Pakistan Army in the Bangladesh Liberation War).

¹¹⁴ Article 4, the High Court of Bangladesh (Amendment) Order, 1972.

¹¹⁵ Ibid.

The framers of the Constitution of Bangladesh, as mentioned earlier, vest the 'executive power of the Republic' in the Prime Minister ¹¹⁶(not in the Head of the State), and conferred the 'legislative powers of the Republic' on the Parliament¹¹⁷ but they did not invest the judiciary with the judicial power of the Republic for reasons best known to them. Thus they embrace the spirit of separation of powers only in case of the executive and legislative, but they preferred to maintain silence as to the vesting of the judicial powers on the judiciary which is placed in Part VI of the Constitution. This is a clear-cut departure from the general practices of the written constitutions to vest the judicial power in the judicial arm of the government. But unlike the Constitution of Malaysia as amended in 1988, which took away judicial power from the High Courts and made them dependant on federal law for their powers and jurisdiction, the superior court of Bangladesh- the Supreme Court comprising of the Appellate Division and the High Court Division¹¹⁸- exercises judicial power of the Republic deriving from the Constitution itself. In the *Mujibur Rahman v Bangladesh*¹¹⁹, the Appellate Division of the Supreme Court of Bangladesh observed that although the Constitution is silent about the vesting of the judicial power in the Supreme Court, there cannot be any doubt that the judicial power of the Republic is vested in the courts with the Supreme Court at the apex.¹²⁰ It should be mentioned here that, after the proclamation of Martial Law on 15 August 1975 which was withdrawn on 6 April 1979, the Martial Law Administration in May 1976 established two independent superior courts- the Supreme Court and the High Court- in place of one superior court under the Second Proclamation (Seventh Amendment) Order No. IV of 1976. Next year, on 27 November 1977, the Supreme Court of Bangladesh was restored as it was originally in the Constitution by issuing the Second Proclamation (Tenth Amendment) Order (No. 1 of 1977).

¹¹⁶ Article 55(2), the Constitution of Bangladesh, 1972.

¹¹⁷ Article 65(1), *ibid*.

¹¹⁸ Article 94(1), *ibid*.

¹¹⁹ 44 DLR (AD) (1992) 111.

¹²⁰ *Ibid*.

The Independence of the Judiciary, which is the central principle underlying the administration of justice, succeeded to acquire the place of a cornerstone in the scheme of the 1972 Constitution of Bangladesh; it is indeed a fundamental feature of the Constitution and one of the central values on which the Constitution is based. Although the Constitution does not explicitly speak of vesting the judicial power in the Judiciary of Bangladesh, it provides, *inter alia*, that 'the State shall ensure the separation of the judiciary from the executive organ of the State'¹²¹, perhaps taking into account the famous words of French Jurist Montesquieu, as mentioned earlier, 'There is no liberty if the judicial power be not separated from the legislative and the executive.' This constitutional provision emphasises the importance of protecting the judiciary from executive interference as an independent judiciary is a backbone of rule of law and rule of law is a fundamental requirement for the existence of a true democracy. Thus the well-chosen words of democracy, rule of law, fundamental rights and freedom, equality and justice have been articulated in the Preamble to the Constitution, pointed out earlier, as the fundamental aim of the State. However, the Constitution explicitly embraces the principle of judicial independence, by providing that 'Subject to the provisions of this Constitution, the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.'¹²² It is interesting to note that the Constitution (Fourth Amendment) Act, passed on 25 January 1975, added Article 116A to the Constitution of Bangladesh, 1972 using similar expression of the independence of judicial officers of the subordinate courts in the exercise of their functions thus: 'Subject to the provisions of the Constitution, all persons employed in the judicial service and all magistrates shall be independent in the exercise of their judicial functions.' Furthermore, Article 35(3) of the Constitution of Bangladesh provides that 'Every person accused of a criminal offence shall have a right to a speedy and public trial by an independent and impartial court or tribunal

¹²¹ Article 22, the Constitution of Bangladesh.

¹²² Article 94(4), the Constitution of Bangladesh, 1972.

established by law.’ In other words, the Article guarantees a fundamental right to every accused person in Bangladesh (whether citizen or not) to have a ‘speedy and public trial’ (as ‘publicity’ is the authentic hallmark of judicial procedure) by not only an ‘independent judiciary’ but also by an ‘impartial judiciary’ meaning members of the judiciary having neutrality of ‘mind or attitude in relation to the issues and the parties in a particular case. Under the Constitution, the Chief Justice of Bangladesh, the Judges of the Appellate Division and the High Court Division of the Supreme Court are not only required to solemnly swear (or affirm) to preserve, protect and defend the Constitution and the laws of Bangladesh’ but also to swear to ‘faithfully discharge the duties of ... [their] office according to law’ and to ‘do right to all manner of people according to law, without fear or favour, affection or ill-will.’¹²³ This pattern of oath for the Chief Justice or Judges of the Supreme Court emphasises that they are expected to hold the scales of justice even between the humblest citizen and an all powerful executive, without fear or favour- regardless of the consequences to themselves. In order to maintain the independence of the judges of the Supreme Court of Bangladesh, like the framers of the Constitution of Malaysia, as mentioned earlier, the framers of the Constitution of Bangladesh also provide that the remuneration, privileges and other terms and conditions of service of a judge of the Supreme Court ‘shall not be varied to ... [his] disadvantage ... during his term of office.’¹²⁴ The present laws which govern these matters are the Supreme Court Judges (Remuneration and Privileges) Ordinance, 1978 and the Supreme Court Judges (Leave, Pension and Privileges) Ordinance, 1982, as amended from time to time to the advantages, not disadvantage, of the Judges of the Supreme Court. Taking into account the above constitutional guarantee of the remuneration and privileges of judges, the Appellate Division of the Supreme Court of Bangladesh observed in *Commissioner of Taxes v Justice S.*

¹²³ Third Schedule, Oaths and Affirmations, Chief Justice or Judges, the Constitution of Bangladesh of 1972.

¹²⁴ Article 147(2) and (4)(e), the Constitution of Bangladesh, 1972.

*Ahmed*¹²⁵ that salary of the Supreme Court judge is exempted from income tax and this position cannot be affected by notification issued under the Income Tax Act.¹²⁶ Like the Constitution of Malaysia, which empowers the superior courts to 'punish any contempt' for maintaining their dignity and authority, the Constitution of Bangladesh also gives the High Court Division and the Appellate Division of the Supreme Court '.... the power subject to law to make an order for the investigation of or punishment for any contempt of itself'¹²⁷ i.e. for scandalising the court to bring its authority into disrespect or disregard, disobeying its orders and interfering with the due course of justice. In *Moazzem Hossain v State*¹²⁸, the Appellate Division of the Supreme Court of Bangladesh rightly observed that the power to punish for the contempt has been given not for the protection of the individual judges from imputations, but for the protection of the public themselves from the mischief they will incur if the authority of the Supreme Court is impaired.¹²⁹ Thus it is evident that the independence of the judiciary has been incorporated into the Constitution of Bangladesh as an integral and inseparable pillar of the Constitution. With regard to ascertaining the basic pillars of the Constitution, the observations made by Justice Shahabuddin Ahmad of the Appellate Division of the Supreme Court of Bangladesh (as he then was) in *Anwar Hossain Chowdhury and Others v Bangladesh*¹³⁰ are worthy of note:

There is no dispute that the Constitution stands on certain fundamental principles which are its structural pillars and if these pillars are demolished or damaged the whole Constitutional

¹²⁵ 42 DLR (AD) (1990) 162 <

http://clcbd.org/index.php?option=com_content&task=view&id=2175&Itemid=82 > (accessed on 20 July 2010).

¹²⁶ Ibid.

¹²⁷ Article 108, the Constitution of Bangladesh, 1972.

¹²⁸ 35 DLR (AD) (1983) 290.

¹²⁹ Ibid.

¹³⁰ 41 DLR (AD) (1989) 165.

edifice will fall down. It is by construing the Constitutional provisions that these pillars are to be identified.¹³¹

He, after referring to the provisions of certain Articles of the Constitution including 94(4) which speaks of the independence of the judges of the Supreme Court in the exercise of their judicial functions, also observed 'Independence of the Judiciary [is] a basic structure of the Constitution'¹³² Later on in 2000, the then Chief Justice of Bangladesh, Justice Mustafa Kamal, referring to the provisions of Article 94(4) and 116A, held in *Secretary, Ministry of Finance v Md. Masder Hossain and Others*¹³³ that:

The independence of the judiciary, as affirmed and declared by Articles 94(4) and 116A, is one of the basic pillars of the Constitution and cannot be demolished, whittled down, curtailed or diminished in any manner whatsoever, except under the existing provisions of the Constitution. It is true that this independence is subject to the provisions of the Constitution, but we find no provision in the Constitution which curtails, diminishes or otherwise abridges this independence.¹³⁴

However, unlike the Constitution of Malaysia, which contains procedural safeguards in Article 127 as to the unexpected discussion of the conduct of judges in the Federal Parliament, the Constitution of Bangladesh does not contain any provision whatsoever aiming at to prevent raising abrupt and indiscriminate questions about the conduct of a judge of the Supreme Court in the Parliament which may cause distress and discomfit to the judge concerned. But the rules of procedure of the Parliament contain provision in this regard: no question, motion or resolution which contains reflection on the conduct of any judge of the

¹³¹ Ibid., at 262.

¹³² Ibid., at 259.

¹³³ 52 DLR (AD) (2000) 82.

¹³⁴ Ibid., at 103.

Supreme Court shall be admissible.¹³⁵ But the enforcement of the provision of the Rules of Procedure in this regard depends generally on the neutrality, boldness and uprightness of the Speaker of the Parliament.¹³⁶

Since the present study is concerned with the substantive independence of the judges of superior courts of Malaysia and Bangladesh, the provisions of the Constitutions of Malaysia

¹³⁵ Rules 53, 63 and 133, Rules of Procedure of the Parliament, 1973. Rule 53 (2) provides that 'In order to be admissible a question must ...', inter alia, '(xviii) not ask for information on a matter which is under adjudication by a Court of Law having jurisdiction in any part of Bangladesh;' '(xx) (a) contain any reflection on the conduct of the Judges of the Supreme Court.' Rule 63, which deals with restrictions on the right to make adjournment motions, provides: 'The right to make an adjournment motion under rule 61 shall be subject to the following restrictions, namely: xi) the motion shall not deal with any matter which is under adjudication by a Court of Law having jurisdiction in any part of Bangladesh; and xii) the motion shall not contain a reflection on the conduct of a Judge of the Supreme Court of Bangladesh. Rule 133 provides that 'No resolution shall be admissible which' inter alia, '(iv)' do 'not relate to any matter which is under adjudication by a court of law having jurisdiction in any part of Bangladesh'; v) do 'not contain a reflection on a Judge of the Supreme Court.'

¹³⁶ In the past, following the pronouncement of the judgment of the *Anwar Hossain Case* in 1989 by the Appellate Division of the Supreme Court of Bangladesh, the then Leader of the Opposition strongly protested and questioned the rational and justification of the decisions given by the Supreme Court. Following a remark of the then Chief Justice of Bangladesh made in 1999, the then Home Minister made some unkind remarks about the judiciary in the Parliament and contradicted the Chief Justice by saying that the judges of the Supreme Court were also responsible for increased violence and terrorism in the country for releasing the notorious criminals on bail. But in neither occasions, the Speaker did stop them from making indecent remarks or attacks on the Chief Justice of Bangladesh and other Judges of the Supreme Court nor their remarks were expunged from the proceedings of the Parliament. The then Prime Minister on 2 August 2000 in an interview with the BBC attacked the judiciary in line with its Home Minister. Furthermore, in a meeting held in Dhaka on 18 April 2000 the speakers, including half a dozen of ministers and state ministers of the Party in power, made outrageous and audacious remarks about certain judges of the Supreme Court, for, they felt embarrassed in hearing the Murder Case (death reference) of Sheik Mujibur Rahman. They went so far as to bring out a procession after the meeting brandishing lethal sticks and warned by saying that they had simply exhibited sticks this time, but these would be applied in future (meaning the Judges of the Supreme Court concerned). (MM Rezaul Karim, 'Resorting to Rule of Law: By Stick and Terror!', *The Daily Star*, 4 May 2000; Staff Correspondent, 'What I [Prime Minister] said is the truth and I'll continue to say it', *The Daily Star*, 5 August 2000 and Staff Correspondent, 'AL blows hot against higher judiciary', *The Daily Star*, 18 April 2000.)

Ultimately three petitions were filed seeking the drawing up of contempt of court proceedings against the Prime Minister. The common allegations in these applications were that on 26 July, 2000, Sheikh Hasina, in an interview with BBC, made objectionable and contemptuous statements that both the lower courts and the High Court Division are the sanctuary of corrupt and accused persons; that whenever they approach the Court, they are released on bail after which they again commit murders; that both, the lawyers seeking bail and the courts granting bail, should be held accountable.

Mr. Mozammel Hoque J. of the High Court Division on 24 October 2000, disposed of all three applications (the case is reported as *Mainul Hosein & others v Sheikh Hasina*, 53 DLR (2001) 138) with a note that, ...*the Hon'ble Prime Minister shall be more careful and respectful in making any statement or comment with regard to the Judiciary or the judges or the Courts of Bangladesh in future.* 53 DLR ((2001) 138, at p. 142, para. 10.) In doing so, he noted that the Court was taking into consideration the greater interest of the country, protection of the prestige and dignity of the highest executive post and avoidance of any possible political unrest over a sensitive issue. He further noted the need to prevent confrontation between the executive and the judiciary and to maintain and preserve harmonious coordination and cooperation between these two important organs of the State.

and Bangladesh concerning the appointment of judges (on which the substantive independence of the judges depends) of the superior courts shall be examined in the second and third chapters of this Dissertation.

Despite the fact that the question of performing judicial functions independently by judges comes after their appointment, the method of appointment of judges is the crucial and dominant factor to ensure their substantive independence, the independence which greatly depends upon the independent character, integrity, impartiality, logic, knowledge and honest motives of the persons who would hold the office of judge. For the appointment of a judge or a group of judges, it is essential that they should be free from any bias or prejudice of political allegiance or other disloyalty to the opinions of its qualifications, merit, ability, competency, integrity and reliable performance as an advocate or judicial officer may bring it, to use the words of President Roosevelt, "Spurious Judges" who can hardly be expected to dispense justice independently according to law and their own sense of justice without regard to the wishes and desire of the government of the day. There is a great possibility that such a judge may remain "indebted to those responsible for his designation ... the beneficiary is exposed to the human temptation to repay his debt by a pliable conduct of his office"¹⁷ especially where the executive itself is a brigant. As H. J. Ladd aptly said, "It is not necessary to suggest that there will be conscious unfairness; but it is ... possible that such judges will, particularly in cases where the liberty of the subject is concerned, find themselves unconsciously biased through over-appreciation of executive difficulty."¹⁸ Therefore, "in appointing judges, a government owes a duty to the people ... to ensure appointment of the highest calibre. Judicial independence can also be subverted by the appointment of persons who do not possess an outstanding level of professional ability, intellectual capacity and experience and integrity and who cannot shake off a sense of

¹⁷ Karl Llewellyn, *Political Power and the Governmental Process* (Chicago: University of Chicago Press, 1949) at p. 164.
¹⁸ H. J. Ladd, *Studies in Law and Politics* (London: George Allen & Unwin Ltd, 1932) at p. 164.

Chapter II

The Method of Appointment of Judges to the Superior Courts of Malaysia Under the Federal Constitution and the Judicial Appointments Commission

Despite the fact that the question of performing judicial functions independently by judges comes after their appointment, the method of appointment of judges is the crucial and dominant factor to ensure their substantive independence, the independence which greatly depends upon the independent character, integrity, equanimity, legal knowledge and keen intellect of the persons who would hold the office of judges. For, the appointment of a judge on account of political allegiance in utter disregard to the questions of his qualifications, merit, ability, competency, integrity and earlier performance as an advocate or judicial officer may bring in, to use the words of President Roosevelt, 'Spineless Judges' who can hardly be expected to dispense justice independently according to law and their own sense of justice without regard to the wishes and desire of the government of the day. There is a great possibility that such a judge may remain 'indebted to those responsible for his designation, the beneficiary is exposed to the human temptation to repay his debt by a pliable conduct of his office'¹³⁷ especially when the executive itself is a litigant. As H. J. Laski aptly said, 'It is not necessary to suggest that there will be conscious unfairness; but it is possible that such judges will, particularly in cases where the liberty of the subject is concerned', find themselves unconsciously biased through over-appreciation of executive difficulty...'¹³⁸ Therefore, 'in appointing judges, a government owes a duty to the people ... to ensure appointees of the highest calibre. Judicial independence can also be subverted by the appointment of persons who do not possess an outstanding level of professional ability, intellectual capacity and experience and integrity, and who cannot shake off a sense of

¹³⁷ Karl Loewenstein, *Political Power and the Governmental Process* (Chicago: University of Chicago Press, 1957) at p. 164.

¹³⁸ H. J. Laski, *Studies in Law and Politics* (London: George Allen & Unwin Ltd., 1932) at p. 164.

gratitude to the appointing authority. It is ... in the interests of the ... people [not] to have their judicial tribunals reduced to timorous institutions.’¹³⁹ The confidence of public in the judges, who administer law, can be retained and preserved if the judges are seen to be not only qualified to perform their functions, but also courageous, independent, impartial and of integrity- integrity of judges being, in the words of Francis Bacon, who as early as 1612 said, ‘above all things ... their portion and proper virtue.’¹⁴⁰ Thus the appointment of right kind of judges having the requisite qualities of professional skill, ability and integrity will go a long way in applying, interpreting and enforcing the law without fear or favour. If ‘the judiciary should be really independent’, rightly observed Justice Venkataramiah in *S. P. Gupta v Union of India*¹⁴¹, ‘something more is necessary and that we have to seek in the judge himself and not outside It is the inner of strength of judges alone that can save the judiciary.’¹⁴² In the same case, Justice Bhagwati also eloquently said: ‘Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says “Be you ever so high, the law is above you.”’¹⁴³ For this reason, some of the national constitutions of the world provide for qualities that a person should possess in order to be considered for appointment as a judge of the superior court. For example, the Constitution of the Islamic Federal Republic of the Comoros, 1978, provides that the members of the Supreme Court shall be chosen on the basis of their competence, their integrity and their knowledge of law.¹⁴⁴ The international standards as laid down in the Universal Declaration on the Independence of Justice, 1983 and the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995 (as amended in Manila on 28 August 1997) also provide for certain criteria for the selection of judges. The

¹³⁹ E. Campbell and HP Lee, *the Australian Judiciary* (Cambridge: Cambridge University Press, 2001) at p. 57.

¹⁴⁰ Francis Bacon, *Essay on Judicature* (1612).

¹⁴¹ AIR 1982 SC 149.

¹⁴² Ibid, at 672.

¹⁴³ Ibid., at 152.

¹⁴⁴ Article 32, the Constitution of the Islamic Federal Republic of the Comoros, 1978.

Universal Declaration enjoins that candidates for judicial officer shall be individuals of integrity, ability and well-trained in the law.¹⁴⁵ More or less in a similar manner, the Beijing Statement calls for 'that judges be chosen on the basis of proven competence, integrity and independence.'¹⁴⁶

Therefore, in order to select persons who are best qualified in terms of legal acumen, ability and knowledge of law for judicial office/ appointment, a suitable and appropriate method of appointment is to be haunted and resorted to as the just means to ensure substantive independence of the judiciary. As the Parliamentary Supremacy, Judicial Independence: Latimer House (in the UK) Guidelines for the Commonwealth, 1998, emphasises that 'The appointment process should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.'¹⁴⁷ However, the manner in which judicial appointments are made in various countries of the world may broadly be grouped into four:

- a. appointment of judges by the head of the state either unilaterally (as in Sri Lanka¹⁴⁸) or on recommendation of, or in consultation with, the Chief Justice of the Supreme Court (as in South Korea¹⁴⁹ and India¹⁵⁰) or after obtaining the agreement of the Leader of the Opposition (as in the Republic of Guyana¹⁵¹) or after selection by a standing committee or commission comprising of the representatives of the higher judiciary, the legislature, the executive and the bar

¹⁴⁵ Article 2.11, the Universal Declaration on the Independence of Justice, 1983.

¹⁴⁶ Article 11, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995 (as amended in Manila in August 1997).

¹⁴⁷ Guidelines II(1), Parliamentary Supremacy, Judicial Independence Latimer House Guidelines for the Commonwealth, 1998.

¹⁴⁸ Article 107, the Constitution of Sri Lanka, 1978.

¹⁴⁹ Article 104(2), the Constitution of the Republic of South Korea, 1948.

¹⁵⁰ Article 124(2), the Constitution of India, 1949.

¹⁵¹ Article 127(1), the Constitution of the Co-operative Republic of Guyana, 1980.

(as in Israel¹⁵²) or on the recommendation of a Judicial Council (as in Nigeria¹⁵³) or from a panel of nominees proposed by the Supreme Court (as in the Republic of Chile¹⁵⁴) or upon approval of the upper chamber of the legislature (as in the USA¹⁵⁵);

- b. election of judges by the legislature (as in Switzerland¹⁵⁶);
- c. election of judges by the people (as only in appointing judges of the lower courts in 38 of the States in the USA¹⁵⁷; and
- d. appointment by the judicial service commission (as in case of appointing members of the judiciary by the Superior Council of the Judiciary in Italy¹⁵⁸ and appointment of judges by the National Judicial Council in Croatia¹⁵⁹).

Of the four methods of appointment of judges, appointment by the head of the state is followed in most of the countries of the world, particularly in most of the common law countries, with striking variations, regarding consulting, recommending or confirming entities. As common law countries, Malaysia and Bangladesh have adopted the method of appointing judges of superior courts by the Heads of the States involving scope for the intrusion of politics in the selection process.

The following discussion will show how in Malaysia the provisions of the original Article 122 of the Merdeka Constitution, 1957 concerning constitutional functionaries required to be consulted and acted upon by the Head of the State, the Yang di Pertuan Agong, in appointing other judges of the Supreme Court have been changed by the Constitution (Amendment) Act,

¹⁵² Article 4(a), Basic Law: the Judicature, 1984. The Judicial Committee of Israel, which is chaired by the Minister of Justice, is comprised of nine members- of which three are judges of the Supreme Court, two are lawyers, two members of Parliament and two cabinet minister.

¹⁵³ Article 231, the Constitution of the Federal Republic of Nigeria, 1999.

¹⁵⁴ Articles 75(2) & 75(3), the Political Constitution of the Republic of Chile, 1980.

¹⁵⁵ Article 2, Section 2, the Constitution of the USA, 1787.

¹⁵⁶ Article 1(11), the Law on the Organisation of the Federal Judiciary.

¹⁵⁷ 1981 (Supp) SCR 87 at p. 791.

¹⁵⁸ Article 105, the Constitution of Italy, 1947.

¹⁵⁹ Article 123, the Constitution of the Republic of Croatia, 1990.

1960; the Head of the State's obligation, after consulting the Conference of Rulers consisting of nine Rulers (the Rulers being the monarchical heads of the component States of the Federation of Malaysia) and four Governors, to act on the recommendation of the Judicial and Legal Service Commission was dispensed with. Furthermore, the discretionary power of the Constitutional Monarch to appoint the Chief Justice of the Supreme Court, after consulting the Conference of Rulers considering the advice of the Prime Minister, was done away with and the real authority to select the judges for appointment was vested in the Prime Minister. The deliberation will also reveal that the Constitution (Amendment) Act, 1963 introduced the new element of consultation by the Prime Minister with the Chief Justice of Malaysia and the respective heads of the three superior courts- the Federal Court, the Court of Appeal and the High Court of Malaya, and the High Court of Sabah and Sarawak- before tendering his advice to the Head of the State for appointing judges of the relevant court. But an additional requirement of consultation with the Chief Minister of each of the States of Sabah by the Prime Minister is required in case of appointing the judges of the High Court of Sabah and Sarawak. It will also display that in order to facilitate the selection of the right candidates for the appointment of judges by the Head of the State, ultimately the Judicial Appointment Commission has been established under the Judicial Appointment Commission Act, 2009, the Act which has been passed without amending the relevant provisions (of Article 122B) of the Federal Constitution. Under the new arrangement, the Commission's independence has not been ensured, it has only been given the power to select and recommend candidates to the Prime Minister who retains his constitutional prerogative to put forward only those names from the list as per his choice and preference to the Yang di-Pertuan Agong, for making judicial appointment acting on his advice. Thus the Commission has fallen much short of the expectation of the relevant quarters.

A. Method of Appointment of Judges to Superior Courts in Malaysia

It may be recalled here that the Constitution of the Federation of Malaya was introduced on 31 August 1957- the Merdeka Day. Subsequently, it was introduced as the Constitution of the Federation of Malaysia on Malaysia Day on 16 September 1963.

A.1. Method of Appointment of Judges under the Constitution of the Federation of Malaya, 1957

The Federation of Malaya Constitutional Commission headed by Lord Reid, a distinguished Lord of Appeal in ordinary, was set up to draft a Constitution of the independent Federation of Malaya. The Commission in its Report submitted in 1957 recommended that the power to appoint the Chief Justice of the Supreme Court should be vested in the Yang di- Pertuan Agong (the Head of the State) and other judges should be appointed by him after consultation with the Chief Justice.¹⁶⁰ This recommendation was revised by a Working Committee, constituted to examine the Report of the Reid Commission in details, and ultimately the following provisions were included in the Constitution of the Federation of Malaya, 1957 for appointing judges of the highest court of the land:

(2) The Chief Justice and the other judges of the Supreme Court shall be appointed by the Yang di- Pertuan Agong.

(3) In appointing the Chief Justice the Yang- di Pertuan Agong may act in his discretion, but after consulting the Conference of Rulers and considering the advice of the Prime Minister; and in appointing the other judges of the Supreme Court he shall, after consulting the Conference of Rulers, act on the recommendation of the Judicial and Legal Service Commission.

¹⁶⁰ Federation of Malaya Constitutional Commission, 1956-1957 Report, Chapter XII (Summary Recommendations) at paras 54-55.

Before acting, in accordance with Clause (3), on the recommendation of the Judicial and Legal Service Commission the Yang-di Pertuan Agong shall consider the advice of the Prime Minister and may once refer the recommendation back to the Commission in order that it may be reconsidered.¹⁶¹

Although the executive authority of the Federation is vested in the Yang di-Pertuan Agong¹⁶², he is, as the constitutional monarch, required to exercise this power in accordance with the advice of the Cabinet¹⁶³ and is obligated to 'accept and act in accordance with such advice.'¹⁶⁴ But he was empowered to act in his discretion in appointing the Chief Justice of the Supreme Court only after consulting the Conference of Rulers and considering the advice of the Prime Minister. Thus the Head of the State's power to appoint the Chief Justice was to be exercised in accordance with his judgment after consulting and taking into account the advice of the two specified constitutional functionaries (the Conference of Rulers and the Prime Minister) who were in a best position to provide for detailed information about the background of the candidates for the position of Chief Justice e.g. education, reputation, integrity, credit history, temperament etc. On the contrary, they were not well equipped to offer any opinion with regard to the legal acumen, knowledge of law, professional skill, merit, competency and suitability of the candidates for the appointment. But in appointing other judges of the Supreme Court, the Yang- di Pertuan Agong did not have any discretion, he was required, after consulting the Conference of Rulers and considering the advice of the Prime Minister to act on the recommendation of the (original) Judicial and Legal Service Commission headed by the Chief Justice of the Supreme Court. The Yang di Pertuan Agong's acceptance of

¹⁶¹ Original Article 122, the Constitution of the Federation of Malaya, 1957.

¹⁶² Article 39, the Constitution of the Federation of Malaya, 1957.

¹⁶³ Article 40(1), *ibid*.

¹⁶⁴ Article 40(1A), *ibid*.

the recommendation of the Judicial and Legal Service Commission, consisting of the Chief Justice, the Attorney General, 'the senior puisne judge', the Deputy Chairman of the Public Service Commission and one or more sitting or former judges of the Supreme Court¹⁶⁵, having intimate knowledge of the persons who might be eminently suitable for appointment on the bench, ensured that only the most right kind and the most suitable candidates would be appointed as the judges of the Supreme Court.

A.2. Method of Appointment of Judges under the Constitution (Amendment) Act, 1960

Within three years of the coming into effect of the Constitution of the Federation of Malaya, the Parliament passed on 31 May 1960 the Constitution (Amendment) Act, 1960 (Act 10 of 1960) which replaced the original method of appointment of judges of the Supreme Court to the following effect:

'...

(2) The Chief Justice and the other judges of the Supreme Court shall be appointed by the Yang di-Pertuan Agong.

(3) In appointing the Chief Justice, the Yang di- Pertuan Agong shall act on the advice of the Prime Minister, after consulting the Conference of Rulers, and in appointing the other judges of the Supreme Court he shall act on the advice of the Prime Minister, after consulting the Conference of Rulers and considering the advice of the Chief Justice.¹⁶⁶

Thus the discretionary power of the Yang di- Pertuan Agong to appoint the Chief Justice (i.e. in appointing the Chief Justice, he could act in his discretion) of the Supreme Court, after consulting the Conference of Rulers and considering the advice

¹⁶⁵ Original Article 138, the Constitution of the Federation of Malaya, 1957.

¹⁶⁶ Amended Article 122, the Constitution of the Federation of Malaya, 1957.

of the Prime Minister, was taken away and real authority to select the Chief Justice was vested in the Prime Minister as the Yang di-Pertuan Agong was required to 'act on the advice of the Prime Minister in appointing the Chief Justice after consulting the Conference of Rulers. Furthermore, the Judicial and Legal Service Commission was abolished and under the new arrangement, it was made obligatory for the Yang di-Pertuan Agong to act on the advice of the Prime Minister, instead of recommendation of the Commission, in appointing other judges of the Supreme Court after consulting the Conference of Rulers and considering the advice of the Chief Justice. Although the new provision of considering the advice of the Chief Justice was introduced because of the realisation that he was properly equipped to know the qualities of the candidate and assess his suitability for appointment as a Supreme Court Judge, the real authority to select the judges was vested in the Prime Minister which did open the door of making appointment to high judicial offices on political consideration or personal favouritism.

B. Method of Appointment of Judges of the Superior Courts under the Constitution of the Federation of Malaysia, 1963

It may be remembered that the Supreme Court was the highest court in the Federation of Malaya next below the Privy Council until 15 September 1963. When the Federation of Malaysia was established on 16 September 1963 under the Malaysia Act (Act No 26/1963), the Part IX of the Constitution was amended to restructure the superior courts in the following manner:

- a) establishment of three High Courts (under the Constitution and Malaysia (Singapore Amendment) Act, 1965, Singapore left the Federation of Malaysia on 9 August 1965 and, as such, the High Court in Singapore was abolished. Thereafter, there are now two High Courts of coordinate jurisdiction and

status- namely High Court for Peninsular Malaysia and High Court for the Borneo, 'the States of Sabah and Sarawak' were substituted for 'the Borneo States');

- b) establishment of the Federal Court as the apex court in place of the Supreme Court¹⁶⁷; and
- c) the Privy Council remained as the highest court appeal for Malaysia. But the Constitutional (Amendment) Act, 1983 provided for the establishment of the Supreme Court of Malaysia replacing the Federal Court as the final court of appeal and the highest court of land. For, the provisions concerning all appeals in civil matters from Malaysia to the Privy Council were abolished from 1 January 1985.¹⁶⁸ As a result, a two-tier superior court system came into existence in Malaysia-
 - 1) the Supreme Court as the final court of appeal in Malaysia; and
 - 2) the two High Courts.

But the Constitution (Amendment) Act, 1994, passed on 24 June 1994, renamed the Supreme Court as the Federal Court and provided for the establishment of the Court of Appeal as an intermediary court. As a result, Malaysia reverted to the following three-tier superior court system:

- 1) the Federal Court as the highest court of the country standing at the apex of the pyramid;
- 2) the Court of Appeal as an intermediary court between the Federal Court and the High Courts; and
- 3) the High Court of Malaya and the High Court of Sabah and Sarawak as the lowest tier of the three-tier superior courts.

¹⁶⁷ Amended Article 121, the Constitution of the Federation of Malaysia, 1963.

¹⁶⁸ Article 131 of the Constitution was repealed.

The Constitution (Amendment) Act, 1963, as amended in 1965 and 1994¹⁶⁹, provides for the following method of appointment of judges to the Federal Court, the Court of Appeal and the High Courts in the Federation of Malaysia:

- i. 'The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to Article 122C) the other judges of the Federal Court, of the Court of Appeal and of the High Courts shall be appointed by the *Yang di- Pertuan Agong*, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.
- ii. Before tendering his advice as to the appointment under Clause (1) of a judge other than the Chief Justice of the Federal Court, the Prime Minister shall consult the Chief Justice.
- iii. Before tendering his advice as to the appointment under Clause (1) of the Chief Judge of a High Court, the Prime Minister shall consult the Chief Judge of each of the High Courts and, if the appointment is to the High Court in Sabah and Sarawak, the Chief Minister of each of the States of Sabah and Sarawak.
- iv. Before tendering his advice as to the appointment under Clause (1) of a judge other than the Chief Justice, President or a Chief Judge, the Prime Minister shall consult, if the appointment is to the Federal Court, the

¹⁶⁹ By the Constitution and Malaysia (Singapore Amendment) Act, 1965 and the Constitution (Amendment) Act, 1994.

Chief Justice of the Federal Court, if the appointment is to the Court of Appeal, the President of the Court of Appeal and, if the appointment is to one of the High Courts, the Chief Judge of that Court.¹⁷⁰

Thus the above procedure for the appointment of judges of superior courts in Malaysia resembled the British practice obtaining prior to the enactment of the Constitutional Reform Act, 2005. The Sovereign (the Queen) used to appoint the Lords of Appeal in Ordinary (Law Lords), the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, the Vice-Chancellor and the Lord Justices of Appeal by convention on the advice of the Prime Minister, who had consulted the Lord Chancellor¹⁷¹, the Chancellor who used to wear executive, legislative and judicial hats¹⁷² as a Cabinet Minister, as the presiding officer (i.e. Speaker) of the House of Lords (the Second Chamber of the Parliament) and as the head of the judiciary (when the House of Lords sat as the final court of appeal) respectively. In the words of Lord Jowitt, who was the Lord Chancellor in the Labour Government until October, 1951,

in practice, the Lord Chancellor would always consult with the Head of the Division to which he was called upon to appoint a Judge. If I had to appoint a Judge to the Queen's Bench Division, I should, in practice, always consult with the Chief Justice; if to the Divorce Division, with the President; if to the Chancery

¹⁷⁰ Article 122B, the Federal Constitution of Malaysia, 1963.

¹⁷¹ O Hood Phillips and Jackson, *Constitutional and Administrative Law* (London: Sweet and Maxwell, 2001) at p. 431; R.M. Jackson, *The Machinery of Justice in England* (New York: Cambridge University Press, 1960) at p. 232.

¹⁷² The Constitutional Reform Act, 2005 took away the judicial and legislative roles of the Lord Chancellor.

Division, with the senior judge When it came to the Court of Appeal, I should consult the Master of the Rolls as to who was the most suitable person.¹⁷³

The ordinary judges of the High Court, who are often called puisne judges, were appointed by the Queen as a convention on the advice of the Lord Chancellor, who no doubt used to consult the Prime Minister.¹⁷⁴ It is maintained that the Lord Chancellor,

who has always been a barrister, and must therefore be a member of one of the four Inns of Courts (completely independent of any governmental control), is the most appropriate Minister to advise on appointments and promotions for the very reason that he is a judge and is qualified for that position by actual practice at the Bar. He knows by experience as an advocate the nature and degree of the knowledge and kind of character and temperament which go to make the best Judges. When he sits he hears eminent Barristers arguing before him. He is in almost daily touch as a Law Lord and a Bencher of his Inn, with the Lords of Appeal and other Judges and members of the Bar. [Sir Albert Napier]¹⁷⁵

However, under the new arrangement, the Constitutional Head is circumscribed to exercise his power of appointing the heads and other judges of three courts- the Federal Court, the Court of Appeal and the two High Courts (the High Court of Sabah and Sarawak) on the advice of the Prime Minister. The Prime Minister of the State, is always required to consult, before giving his advice to the Head of the State, the Conference of Rulers (the Rulers being the monarchical heads of the component nine States of the Federation of Malaysia) and in respect of the appointment of the judges of

¹⁷³ John Honnold (ed), *The Life of the Law: Readings on the Growth of Legal Institutions* (New York: The Free Press, 1964) at p. 270.

¹⁷⁴ Supra note 171.

¹⁷⁵ Sir Albert Napier, the Permanent Secretary of the Office of Lord Chancellor, wrote in a paper prepared in 1963. John Honnold (ed), supra note 37.

three superior courts, the respective heads of the courts, i.e. Chief Justice, the President or the Chief Judge as applicable. Furthermore, in appointing judges of the High Court in Sabah and Sarawak, the Head of the State is obligated to consult the Chief Minister of each of the two States. The constitutional purpose of selecting the best and most suitable candidates from amongst those available for appointment as judges of the superior courts will be achieved through advice not only of the Prime Minister and consultation with the Conference of Rulers (and the Chief Minister of each of the two States of Sabah and Sarawak only in appointing judges of the High Courts in Sabah and Sarawak) but also consulting the heads of three superior courts so that every relevant particular about the candidates is known and duly weighed as a result of effective consultation among all the consultees. It should be stressed here that each of the functionaries has a distinct and valuable role to play as to the antecedents and legal suitability of candidates for appointment. The Conference of Rulers, through their instrumentalities, can procure relevant information about the suitability of the candidates proposed in terms of honesty, integrity, general pattern of behaviour, social acceptability, political affiliation/allegiance and commitment to rule of law which have a considerable bearing on his working as a judge. Sultan Azlan Shah finds it difficult 'to rationalise why a Prime Minister would not want to consider, or even abide by the views of nine Rulers and four Governors who constitute the Conference of Rulers' as they are independent persons, with vast experiences, and with no vested interest in the nominated candidates. Their duty is to fulfil their constitutional role in ensuring that only the best and most suited

candidates are selected for the posts.¹⁷⁶ Similar arguments can be put forward for the acceptance or giving great weight, unless there is strong and cogent reason for not doing so, of the advice of the heads of three superior courts- the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the two High Courts as expert advices. For, they are in all likelihood profoundly qualified to render advice objectively on professional suitability of the candidates for judgeship in terms of their legal experience, reputation, knowledge of law, legal competence, keen intellect, neutrality of mind and judicial potentiality. Thus the provisions of consultation with the Conference of Rulers and the head of the three superior courts by the Prime Minister are aimed at to act as safeguards against the selection for appointment of improper and unsuitable persons as judges taken into account extraneous or irrelevant considerations. The effectiveness of this consultation process in making higher judicial appointment in Malaysia cannot straightaway be ascertained as the process is not transparent and known to the public; strict secrecy is maintained from identifying the candidates to the issuance of the warrant. Furthermore, after consultation with the constitutional functionaries, the final word in respect of the sensitive subject of the appointment of judges of superior courts belongs to the Prime Minister on whose advice the Head of the State is obliged to make the judicial appointment and, as such, seemingly there is the scope of considering those with the right political patronage and right beliefs as the most suitable for appointment. But Justice Abdul Hamid Omar, a former Lord President of the Supreme Court of Malaysia, made a wholesale and unqualified comment in 1994 that no Prime Minister of the

¹⁷⁶ Sultan Azlan Shah, 'The Role of Constitutional Rulers and the Judiciary Revisited' in Sinnadurai, V (ed.), *Constitutional Monarchy, Rule of Law and Good Governance* (Kuala Lumpur: Professional Law Books, 2004) at p. 397.

Country was ever moved by parochial considerations in selecting the candidates for appointment as judges of superior courts by the Head of the State. As he said:

All successive Prime Ministers have been mindful of their constitutional role in the appointment of judges and have been sensitive to the need for an independent judiciary. As a result, unlike the appointment of judges in some other countries, judges in Malaysia, are not appointed because they support, or belong to the ruling party in power or become they are sympathetic towards certain issues of public interest, or ideologies.¹⁷⁷

But there is a complete different version from another former Judge of the then Supreme Court of Malaysia, Datuk George Seah, an independent minded Judge who was removed as a victim of judicial crisis of 1988, the crisis, to use the words of former Prime Minister Abdullah Ahmad Badawi (2003-2009) 'from which the nation never fully recovered.'¹⁷⁸ He in an Article¹⁷⁹ published

¹⁷⁷ Tun Dato' Seri Abdul Hamid Omar, *The Judiciary in Malaysia* (Kuala Lumpur: Asia Pacific Publications Sdn Bhd, 1994) at p. 85.

¹⁷⁸ Shaila Koshy, Chelsea L.Y. Ng, Shahanaaz Habib, Cecil Fung, Teh Eng Hock and Jo Teh, 'Government moves to strengthen judiciary', *The Star*, 18 April 2008 <<http://thestar.com.my/news/story.asp?file=/2008/4/18/nation/20992653&sec=nation>> (accessed on 5 November 2010).

¹⁷⁹ In that Article, Datuk George Seah referred to systematically the suspension of the then Lord President Tun Salleh Abbas which deprived him of the opportunity to preside over a full bench of nine judges of the Supreme Court to hear and determine the appeal challenging the validity and legality of the 1987 UMNO Presidential election. Then he referred to the subsequent hearing and dismissing of the appeal on 9 August 1988 by a Panel of 5 Supreme Court and High Court Judges headed by acting Lord President Tan Sri Hamid and Chairman of the First Tribunal set up to investigate the charges against the incumbent Lord President Tun Salleh as to the convening of a meeting of the judges (in which Sri Hamid Omar was also present) that decided to send the relevant letter (about the Prime Minister) to the King and State Rulers. Datuk George Seah also dealt with the convening of the Special Sitting of the Supreme Court on 2 July 1988 by five of its judges (presided over by Tan Sri Wan Sulaiman) that unanimously interpreted the provision of section 9(1) of the Courts of Judicature Act, 1964 to the effect that the acting Lord President Tan Sri Abdul Hamid could not exercise the powers or perform the duties of his office by virtue of being appointed as the Chairman of the Tribunal set up under Article 125(4) of the Federal Constitution and should distance himself from being involved, directly or indirectly, in any court proceeding brought by Tun Salleh Abbas and an Interlocutory Order restraining the First Tribunal from 'submitting any recommendation, report or advice 'to His Majesty Yang di- Pertuan Agong-pending the hearing and disposal of the civil suit that had been filed in the Kuala Lumpur High Court

in 2004 brought to light patronage appointments made after 1988 judicial crisis for the services rendered to the party in power:

Unsurprisingly, all the High Court Judges who were involved in the UMNO 11 appeal, in the Tun Salleh Abbas's civil suit and the Interlocutory Order and those in the Second Tribunal set up to deal with the charges against the five Judges of the Supreme Court were eventually elevated to the Supreme Court. Three of them were later appointed Chief Justices of the High Court in Malaya.¹⁸⁰

He also made public:

The three Malaysian High Court Judges in the Second Tribunal who delivered the majority decision recommending the dismissal of [two Supreme Court Judges] Tan Sri Wan Sulaiman and Datuk George Seah were all appointed to the Supreme Court. One of them was subsequently appointed Chief Justice of the Federal Court (the Supreme Court of Malaya was later renamed the Federal Court) and another promoted as President of the Court of Appeal.¹⁸¹

He further divulged, 'Even Dato Ajaib Singh who first heard and refused' a temporary stay in the High Court in Kuala Lumpur, was later elevated to the Supreme Court.¹⁸²

challenging the 'constitutionality, legality and validity of the Tribunal. He focussed on the setting aside of this Interlocutory Order by a Panel of two judges of the Supreme Court and three judges of the High Court, and the establishment of the Second Tribunal to deal with the charges (intentionally convening the 2 July 1988 sitting of the Supreme Court in contravention of Section 38(1) and 39(1) of the Courts of Judicature Act, 1964 and without the permission or knowledge of the acting Lord President Tan Sri Abdul Hamid) against five judges of the Supreme Court. Furthermore, he commented on the signing of the majority judgment of the Tribunal by the three junior Judges of the High Court in Malaya (having ranked no 13, 14 and 25 in the seniority list as contained in MLJ Vol. 1. 1988) against the five suspended judges of the Supreme Court which tantamount to pronouncing judgment by the colonels against the generals. Datuk George Seah, 'Crisis in the Judiciary- Part 4 & 5, the Suspension of the Supreme Court,' *Infoline*, 1 May 2004, at pp. 46-49.

¹⁸⁰ Ibid, at p. 49.

¹⁸¹ Ibid, at pp. 49-50.

¹⁸² Ibid, at p. 50

There are some other direct appointments to the Federal Court made on the grounds of personal or political patronage. For example, former Attorney General Mokhtar Abdullah was appointed as a Federal Court Judge in January 2002 allegedly for his service rendered as the head of the prosecution team against former Deputy Prime Minister Anwar Ibrahim.¹⁸³ Similarly, Tan Sri Zaki Azmi, a former Legal Advisor to the UMNO and Chairman of the Party's Election Committee, was directly appointed as a Judge of the Federal Court in September 2007 and in October 2008 as its Chief Justice.¹⁸⁴

However, commenting on the system of vesting the authority in the hands of the executive to appoint higher echelon judges, Justice Bhagwati of the Indian Supreme Court in *S. P. Gupta v Union of India*¹⁸⁵ observed:

This is, of course, not an ideal system of appointment of judges, but the reason why the power of appointment of judges is left to the Executive appears to be that the Executive is responsible to the Legislature and through the Legislature, it is accountable to the people, who are consumers of justice, [for making] any wrong or improper appointment.¹⁸⁶

But it may be submitted that in a parliamentary democracy, which is prevalent in many countries, including Bangladesh, India and Malaysia, the Prime Minister commands a majority in Parliament and, as such, it can hardly be expected that a vote of censure be passed against him disapproving his 'wrong or improper appointment' of judges in superior courts. Even the Speaker of the Parliament, who always belongs to the ruling party, may not allow putting

¹⁸³ SUARAM, Malaysian Human Rights Report (Civil and Political Rights), 2001, at p. 135.

¹⁸⁴ SUARAM, Overview of the Malaysian Civil and Political Rights Report, 2008, at pp. 19-20.

¹⁸⁵ 1981 Supp SCC 87.

¹⁸⁶ Ibid., at p. 230.

down a question in the Parliament involving improper appointment of judges of superior courts.

However, the method to appoint judges in the superior courts, as provided for in the Federal Constitution of Malaysia, contains two types of provisions, namely, a) general provisions for the appointment of the Chief Justice of the Federal Court and all judges, and b) additional provisions involving requirement of consultation for the appointment of the Federal Court Judges, the Court of Appeal Judges, the High Court Judges, the President of the Court of Appeal and the two Chief Judges of the High Courts.

a) General Provisions for the Appointment of the Chief Justice of the Federal Court and other Judges of the Three Superior Courts

Article 122B(1) stipulates that the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and the other judges of these courts shall be appointed by the Yang di-Pertuan Agong 'acting on the advice of the Prime Minister, after consulting the Conference of Rulers.' It should be stressed here that the Constitution of Malaysia does not provide for further consultation with any other functionary by the Prime Minister in giving advice to the Head of the State for the appointment of the Chief Justice of the Federal Court as it is required in case of appointment of the heads of the two other superior courts in Malaysia. Thus the selection of the head of the Malaysian Judiciary and *paterfamilias* of the judicial fraternity depends entirely and exclusively on the Prime Minister's pleasure. Furthermore, the Constitution of Malaysia does not provide for any special criterion (e.g. senior most judge of the Federal Court for the appointment of Chief

Justice) except general eligibility criteria as laid down in Article 123 of the Constitution, to be discussed later on, which are equally applicable in cases of appointment of judges of all the three superior courts. Therefore, it can strongly be argued that theoretically any advocate or judicial officer who fulfils the stipulated criteria can directly be appointed as the Chief Justice of the Federal Court¹⁸⁷ apart from the judges of the Federal Court, the Court of Appeal and the High Courts. But in practice, no such person (i.e. an advocate or a judicial officer) has yet been directly appointed as the Chief Justice of the Federal Court. It may be suggested that the Constitution be amended to provide for the appointment of the senior most judge of the Federal Court as the Chief Justice of the Federal Court whenever vacancy occurs in that office although he might not be a brilliant judge. For selecting the Chief Justice by seniority will prevent the Prime Minister from picking and choosing from among the judges taking into account political affiliation and will forestall a scramble among the judges for the highest post to show who has better imbibed the gospel of the party in power. This promotion/ appointment on the basis of seniority has been considered in France as a guarantee of judicial independence. As Brown and Garner say: 'Promotion upon seniority of service is regarded by members of the Conseil [d'Etat, Judicial Section] as the essential guarantee of their independence.'¹⁸⁸

¹⁸⁷ In Pakistan, when it was composed of West Pakistan and East Pakistan, Justice Monzur Quader Chowdhury was directly appointed as the Chief Justice of West Pakistan.

¹⁸⁸ L.N. Brown and J. F. Garner, *French Administrative Law* (London: Butterworth, 1983) at p. 55.

b. Special Provisions Involving Additional Requirement of Consultation for the Appointment of Judges of the Superior Courts and the Heads of the Court of Appeal and the two High Courts

The Prime Minister, other than the appointment of Chief Justice of the Federal Court, has an additional constitutional duty to consult the Chief Justice and/or the heads of the different courts depending on which court the judge is being appointed. Thus he before tendering his advice to the Head of the State in respect of the appointment of a judge to the Court of Appeal, he is further needed to consult the President of the Court of Appeal and relating to the appointment of a judge to one of the High Courts, the Prime Minister is also enjoined to consult the Chief Judge of the [High] Court concerned. But it should be emphasised that for the appointment of all the judges of these three superior courts, the Article 122B (2) of the Federal Constitution of Malaysia makes it mandatory for the Prime Minister to consult the Chief Justice of the Federal Court before tendering his advice to the Yang di- Pertuan Agong and, as such, the Chief Justice of the Federal Court plays a definite and positive role in the judicial appointment process of Malaysia.

Since the President of the Court of the Court of Appeal is not categorised/graded as a Court of Appeal Judge and by virtue of his post is a member of the Federal Court, there is no additional stipulation mentioned in the Federal Constitution for his appointment; the Prime Minister under Article 122B (2) of the Constitution consults the Chief Justice of the Federal Court before tendering his advice to the Yang di-

Pertuan Agong for appointing a Federal Court Judge to the post of the President of the Court of Appeal.

In the appointment of the Chief Judge of the High Court of Malaya, the Prime Minister is required to consult the Chief Judge of Sabah and Sarawak and vice versa. But if the appointment is for the post of the Chief Judge of Sabah and Sarawak, the Prime Minister is further needed to consult the Chief Minister of each of the States of Sabah and Sarawak.

The consultation of the Prime Minister with different consultees, as required by the Constitution before tendering his advice to the Head of the State as to the appointment of judges to the superior courts, namely, the Federal Court, Court of Appeal and the High Court, in Malaysia does not mean that he is under an obligation to secure their consent. The Prime Minister is not at all required to accept their opinion or views.

The constitutional provisions concerning the appointment of judges of the superior courts in Malaysia were first examined by the Court of Appeal in 2002 in *Re Dato' Seri Amwar Ibrahim*¹⁸⁹ without addressing the main issue of disqualifying the judge concerned (Ya Datuk Hj Mokhtar bin Hj. Sidin) from hearing the present appeal from a decision of the High Court on the ground of likelihood of bias on the judge's part as the appellant, the then Deputy Prime Minister being the Acting Prime Minister (June- August 1997) of the Country made adverse comments against the elevation of the relevant judge to the Court of Appeal at the Conference of Rulers.¹⁹⁰ In interpreting the general provisions of Article 122B (1) of the Federal

¹⁸⁹ [2000] 2 CLJ 570.

¹⁹⁰ The Judge Lamin Mohd. Yunus PCA, who delivered the decision of the Court of Appeal, was quite convinced and satisfied with the assertion of the judge concerned that 'he has nothing against' the appellant and with his assurance that 'he will perform his function and discharge his duties as a Judge without fear or favour in order to serve the ends of justice.' Ibid., at 572 f.

Constitution concerning the manner in which judges of superior courts are appointed, Lamin Mohd. Yunus PCA, delivering the judgment of the Court, rightly held that: 'the Yang di- Pertuan Agong must act on the advice of the Prime Minister.'¹⁹¹ Although the Prime Minister is required to advise the Yang di- Pertuan Agong as to the appointment of heads and other judges of the superior courts, 'after consulting the Conference of Rulers,' Lamin PCA misconstrued this requirement as specified in Article 122B (1) as consultation between the King and the Conference of Rulers. As he observed:

... the Yang di- Pertuan Agong is required to consult the Conference of Rulers before making the appointment. To consult means to refer a matter for advice, opinion or views To "consult" does not mean to "consent" [as] the word consent is used [in separate context] in Article 159(5) of the Constitution which states that amendments to certain provisions of the Constitution cannot be passed by Parliament without the "consent" of the Conference of Rulers so in the matter of the appointment of judges, when the Yang di- Pertuan Agong consults the Conference of Rulers, he does not seek its "consent". He merely consults. So when the Conference of Rulers gives its advice, opinion or views, the question is, is the Yang di- Pertuan Agong bound to accept. Clearly he is not. He may consider the advice or opinion given but he is not bound by it.¹⁹²

He further observed in this regard:

'So in the context of the Article 122B (1) of the Constitution where the Prime Minister has advised that a person be appointed a judge and if the Conference of Rulers does not agree or withholds its views or delays the giving of its

¹⁹¹ Ibid., at 571-b.

¹⁹² Ibid., at p. 571-b, d, f.

advice with or without reasons, legally the Prime Minister can insist that the appointment be proceeded with.¹⁹³

Sultan Azlan Shah, who was the head of the Malaysia Judiciary from 1982 to 1984 and is quite familiar with the constitutional practice of appointing judges (as an intimate insider), rightly called into question and objected to the above observation of Lamin PCA. As he contended:

[T]he statements made by Lamin PCA in this case seem to suggest that the Conference of Rulers gives its advice directly (and only) to the Yang di-Pertuan Agong, and not to the Prime Minister. In practice, this is not the case. The Prime Minister submits the names of the candidates to the Conference of Rulers. The Conference then submits its views to the Prime Minister before he tenders his advice to the Yang di- Pertuan. Therefore, the views of the Conference are strictly speaking, given to the Prime Minister. It is then for him to consider these views before he makes the final recommendation to the Yang di- Pertuan Agong.¹⁹⁴

He further stressed:

To suggest that their [the Conference of Rulers] advice is given directly to the Yang di- Pertuan Agong will render this entire constitutional process meaningless, since when the Prime Minister submits the name to the Yang di- Pertuan Agong, the Yang di- Pertuan Agong is duty- bound, under Article 40 (1A) [and also under Article 122B (1)] to accept the advice of the Prime Minister.¹⁹⁵

Thus after obtaining the views or suggestions of the Conference of Rulers (and other Constitutional functionaries, e.g. the three heads of the superior courts, the Chief Minister of each of the States of Sabah and Sarawak), the

¹⁹³ Ibid, at p. 571-i- 572- a.

¹⁹⁴ Sultan Azlan Shah, *supra* note 176.

¹⁹⁵ Ibid.

Prime Minister gives his advice to the Yang di- Pertuan Agong for the appointment of judges of the superior courts and the King has no choice but to accept and act on his (Prime Minister's) advice and, as such, the selection and appointment of judges is virtually within the power and jurisdiction of the Prime Minister. Thus the Constitution has vested the pivotal role in the hands of the Head of the Government- the Prime Minister- regarding judicial appointment.

c. Appointment of Additional Judge in the Federal Court

Of the three superior courts- the Federal Court, the Court of Appeal and the High Courts- in Malaysia, the Federal Constitution speaks of the appointment of additional judges only in the Federal Court 'for such purposes or for such period of time as' the Yang di- Pertuan Agong 'may specify.'¹⁹⁶ Any person who has held high judicial office in Malaysia can be appointed by the Yang di- Pertuan Agong as an additional judge acting solely on the advice of the Chief Justice of the Federal Court.¹⁹⁷ It seems that, because of the temporary nature of appointment of an additional judge, unlike the appointment of regular judges of the Federal Court, the Head of the State has no obligation whatsoever to act on the advice of the Prime Minister, after consulting the Conference of Rulers in appointing an additional judge. Since any person who has held high judicial office in Malaysia can be appointed as an additional judge by the Head of the State entirely on the advice of the Chief Justice of the Federal Court and 'no such additional judge shall be ineligible to hold office by reason of having

¹⁹⁶ Article 122(1A), the Federal Constitution of Malaysia.

¹⁹⁷ Ibid.

attained the age of sixty-six years,'¹⁹⁸ it seems that the provision for the appointment of an additional judge has been incorporated into the Constitution for judicial consideration. Thus such an additional judge can be appointed when a judge of the Federal Court is on leave of absence or is incapable of performing his functions or when the existing judges are either disqualified from hearing an appeal or insufficient in number to hear and determine a particular appeal involving constitutional interpretation. However, no 'additional judge has been appointed to the Federal Court in recent years.'¹⁹⁹

d. Appointment of Judicial Commissioners in the Two High Courts

The Federal Constitution of Malaysia, as amended in 1963, provided for the first time the provision for the appointment of judicial commissioners in the two High Courts of Malaysia. Later on in 1994, the method of appointment was amended in the following manner:

1) For the despatch of business of the High Court in Malaya and the High Court in Sabah and Sarawak, the Yang di- Pertuan Agong acting on the advice of the Prime Minister after consulting the Chief Justice of the Federal Court, may by order appoint to be judicial commissioner for such period or such purposes as may be specified in the order any person qualified for appointment as a judge of a High Court; and the person so appointed shall have power to perform such functions of a judge of the High Court as appear to him to require to be performed.²⁰⁰

¹⁹⁸ Proviso to Article 122(1A), *ibid*.

¹⁹⁹ Abdul Hamid Omar, *supra* note 177, at p. 79.

²⁰⁰ Article 122AB, the Federal Constitution of Malaysia.

Thus under the new arrangement made in 1994, the previous difference introduced in 1963 between the method of appointment of judicial commissioners in two different High Courts²⁰¹ has been done away with. A new uniform procedure for the appointment of judicial commissioners in the High Court in Malaysia and the High Court in Sabah and Sarawak- the Yang di- Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may appoint a judicial commissioner- has been introduced in 1994. Thus unlike the appointment of regular judges of the High Courts, the Prime Minister is not required to consult the Conference of Rulers (Majlis Raja- Raja) and the Chief Judge of the High Court concerned before tendering his advice to the Yang di- Pertuan Agong as to the appointment of judicial commissioners in the High Court in Malaya and the High Court in Sabah and Sarawak. The provision for non-consultation of the Chief Judge of the relevant High Court in which judicial commissioners are to perform functions can hardly be justified. It should be stressed here that Article 122A (3), added to the Federal Constitution of Malaysia in 1963, expressly provided for the situation- when a judge of the High Court in Borneo 'is not for the time being available to attend to business of the court- in which judicial commissioners in that court could be appointed 'for such purposes as may be specified in the order.' But in case of the appointment of judicial commissioners in the High Court in Malaya no such express ground was

²⁰¹ For the High Court in Borneo (since 1994 Sabah and Sarawak), the Yang di- Pertuan Agong acting on the advice of the Lord President of the Supreme Court (in 1994 the name of the Supreme Court was changed to Federal Court and the post of Lord President of the Supreme Court was changed to the Chief Justice of the Federal Court), or for 'either State the Yang di- Pertuan Negeri of the State acting on the advice of the Chief Justice of the Court', could appoint judicial commissioner²⁰¹ and for the High Court in Malaysia, 'the Yang di- Pertuan Agong acting on the advice of the Lord President of the Supreme Court,' could appoint judicial commissioners. Article 122A (3) and (5), as added to the Federal Constitution of Malaysia in 1963.

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provided for; only vague expression of 'for such purposes as may be specified in the order'²⁰² was mentioned. But the Federal Constitution of Malaysia, as amended in 1994, does not expressly provide for the grounds of appointment, by using the expression for 'such purposes' as may be specified in the order of appointment of judicial commissioners. As a result, judicial commissioners may sometimes be appointed not for judicial but for political considerations.

Furthermore, the tenure of judicial commissioners is at the pleasure of the appointing authority; they are appointed 'for such period' as may be specified in the order of appointment. Justice Abdul Hamid Omar, during whose tenure as the Lord President/Chief Justice, the practice of appointing judicial commissioners on a two year contract became the standard procedure for the appointment of High Court Judges, maintained, 'As a general rule, most judicial commissioners who were initially appointed for such a period, have, subsequently, been appointed as High Court judges'²⁰³ on the recommendation of the Chief Justice (or Lord President as it was known before) of the Federal Court, to the Prime Minister. This assertion of a former head of the Malaysian Judiciary reveals that not all the judicial commissioners, but 'most' of them, appointed on contract basis for an initial term of two years, found berths as the permanent judges of the High Courts. Later on, in March 2009, the Judicial Appointments Commission, which was set up in February 2009, recommended only 6 out of twenty-five applications received from serving judicial commissioners for appointment as judges of the High Court and

²⁰² Ibid.

²⁰³ Abdul Hamid Omar, *supra* note 177, at p. 81.

ultimately they were appointed as High Court Judges in October 2009.²⁰⁴ Therefore, it can strongly be argued that a judicial commissioner may not always hold the scale of justice even between the state and the citizen without fear or favour. For, rendering a fearless judgment against the government may cost him appointment as a tenured judge of the High Courts. In an express reference to certain servile judicial commissioner Datuk Dato' Param Cumaraswamy, (a distinguished Lawyer of Malaysia and) the United Nations (first) Special Rapporteur on the Independence of Judges and Lawyers said that the recent 'promotions of Augustine Paul, Arifin Jaka and Pajan Singh Gill [in 2003] will be perceived by the public as a reward for having "delivered."²⁰⁵ Unlike the judges of the three superior courts, the Federal Constitution does not limit the number of judicial commissioners to be appointed in the two High Courts of Malaysia. Taking the advantage of this lacuna, 68 judicial commissioners have been appointed until August 2010²⁰⁶ as against seventy-one regular High Court Judges (in the face of sanctioned posts of 60 for the High Court of Malaya and 13 for the High Court of Sabah and Sarawak, altogether 73²⁰⁷) allegedly 'to clear the backlog of cases' who 'will be on

²⁰⁴ Annual Report of the Judicial Appointments Commission, 2009, at p. 28.

²⁰⁵ Infoline, the Malaysian Bar's Official Newsletter, July 2003.

²⁰⁶ Tunku Sofiah Jewa, Salleh Buang and Yaacob Hussain Merican (eds), *Tun Mohamed Suffian's An Introduction to the Constitution of Malaysia* (Petaling Jaya: Pacific Publications, 3rd edn, 2007) at pp. 118-119. Annual Report of the Judicial Appointments Commission, 2009, at p. 34. Appointments Summary of the Judicial Appointments Commission until 13 August 2010 <
http://translate.google.com.my/translate?hl=en&sl=ms&u=http://www.jac.gov.my/&ei=nyz9TKL1KY_RrQfB5qmZCA&sa=X&oi=translate&ct=result&resnum=1&ved=0CBsQ7gEwAA&prev=/search%3Fq%3Djudicial%2Bappointments%2Bcommission%2Bmalaysia%26hl%3Den%26safe%3Doff%26prmd%3Div> (accessed on 20 November 2010).

²⁰⁷ Annual Report of the Judicial Appointments Commission, 2009, at p. 28. Appointments Summary of the Judicial Appointments Commission until 13 August 2010 <
http://translate.google.com.my/translate?hl=en&sl=ms&u=http://www.jac.gov.my/&ei=nyz9TKL1KY_RrQfB5qmZCA&sa=X&oi=translate&ct=result&resnum=1&ved=0CBsQ7gEwAA&prev=/search%3Fq%3Djudicial%2Bappointments%2Bcommission%2Bmalaysia%26hl%3Den%26safe%3Doff%26prmd%3Div> (accessed on 20 November 2010).

probation pending their elevation as High Court judges.’ The number of judicial commissioners functioning at the High Courts in Malaya and Sabah and Sarawak until 10 June 2009 is 38.²⁰⁸

Therefore, taking into account the detrimental impact of appointing on temporary basis the judicial commissioners upon the independence of the judiciary, only very few constitutions of the world, e.g. the Constitution of Singapore, 1963 and the Constitution of Sri Lanka, 1978 provide for the appointment of judicial commissioner to the Supreme Court of Singapore²⁰⁹ (‘in order to facilitate the disposal of the business in the ... Court’) and to the High Court of Sri Lanka²¹⁰ (if the Justice Minister represents to the President that it is expedient that the number of the judges exercising the jurisdiction and power of the Court in any judicial zone should be temporarily increased) respectively. International standards also disapprove the institution of temporary judges. As the Montreal Declaration on the Independence of Justice, 1983 states that the appointment of temporary judges is inconsistent with judicial independence and calls for phasing out gradually where such appointments exist.²¹¹

²⁰⁸ Judicial Commissioners Of the High Courts In Malaya And Sabah And Sarawak (As at 10 JUNE 2009) <
²⁰⁹ http://www.kehakiman.gov.my/html/judiciary_members.shtml> (accessed on 20 November 2010).

²¹⁰ Article 94(4) and (5), the Constitution of Singapore, 1963.

²¹¹ Article 111A, the Constitution of Sri Lanka, 1978.

Article 2.20, the Montreal Declaration on the Independence of Justice, 1983.

C. Judicial Appointments Commission Act, 2009

C.1. Background of Enacting the Act

The 1988 judicial crisis, which is an unprecedented upheaval and turmoil in the Malaysian Judiciary, witnessed the unceremonious dismissal of the then Lord President²¹² and two Supreme Court Judges²¹³ and their vacant posts filled in allegedly with the favourites of the regime. For example, the then Chief Justice of Malaya and acting Lord President of the Supreme Court Abdul Hamid Omar, who chaired the First Tribunal that recommended the removal of Tun Salleh Abbas as Lord President, was appointed as Lord President to succeed Tun Salleh Abbas on 10 November 1988 and Tun Eusoff Chin, who chaired the Second Tribunal that recommended injudiciously the removal of two of the five Judges of the then Supreme Court, was first appointed as the Chief Justice of the High Court of Malaya on 21 May 1994 and eventually as the Chief Justice of Malaysia on 23 September of the same year (and remained in that office till December 2000).²¹⁴ Both the justices, particularly Tun Eusoff Chin, confronted with grave allegations during their terms of office which had the dreadful impact of eroding the public confidence in impartiality and independence of the Malaysian Judiciary. Lord President Abdul Hamid Omar, who upheld the allegations of misconduct against his predecessor Tun Salleh Abbas in 1988, faced allegations of meeting privately on 24 March 1994 with Chief Executive of a Company who had been involved in a litigation pending before the Supreme Court, and thereafter presiding over an interlocutory appeal (on 24 April 1994), in which he gave decision in favour of the company. Although later he admitted meeting the Executive in private, Abdul Hamid Omar maintained that he did not discuss the

²¹² Tun Salleh Abbas.

²¹³ Tan Sri Wan Suleiman and Datuk George Seah.

²¹⁴ Supra note 179.

case with him.²¹⁵ If his admission is true, yet it is in violation of the celebrated oft-quoted maxim that justice must not only be done but also seen to be expressly and manifestly done. Perhaps Tun Eusoff Chin tops the list of the Chief Justices of Malaysia against whom several allegations of impropriety were brought about. In the first place, he went to New Zealand in 1995 with a lawyer on a family holiday (as pictures of this family trip appeared on the internet, the *de facto* Law Minister in the Prime Minister's Department described the conduct of the Chief Justice as 'improper behaviour'²¹⁶), and, on return, he sat on an appeal case in which that lawyer appeared only to get the decision in his favour. Secondly, in deciding an appeal in 1995 in *Insas Bhd and Megapolitan Nominees Sdn Bhd v Ayer Molek Rubber Co Bhd and others*²¹⁷ against the granting of an interlocutory injunction by the Court of Appeal restraining Insas from exercising any rights attached to the shares of RM 160 million in pursuance of an ex parte order of the High Court pending the disposal of the appeal, the Chief Justice, Tun Eusoff Chin, not only masterminded the Coram of the Federal Court co-opting the High Court Judge P.S. Gill to sit in the Federal Court in violation of the provisions of Article 122(2) of the Federal Constitution (which allows only a Judge of the Court of Appeal to sit as a Judge of the Federal Court where the Chief Justice considers that the interests of justice so require) but also overruled the decision of the Court of Appeal expunging some of the observations made by Justice N.H. Chan to the effect that 'an injustice perpetrated by a court of law.' This set the first example of expunging the observation of a second ranked court, the Court of Appeal, in the judicial history of Malaysia.²¹⁸ In that case, N. H. Chan J of the Court of

²¹⁵ Cited in Wu Min Aun, 'The Malaysian Judiciary: Erosion of Confidence', (1999) 1(2) *Australian Journal of Asian Law* 124.

²¹⁶ *New Strait Times*, 30 May 2000.

²¹⁷ [1995] 2 MLJ 833 (FCM).

²¹⁸ In September 2006, the High Court observed in *Dato V. Kanagalingam v David Samuels & Ors* that the decision of the Federal Court in the Ayer Molek case was a nullity. [2006] 3 CLJ 909; [2006] 5 AMR 402.

Appeal, with reference to the deliberate non-filing of the complex commercial case before the competent Commercial Division, observed: '.... [the conduct of the judge and the lawyer in this case] give the impression to the right-thinking people that litigants can choose the Judge before whom they wish to appear for their case to be adjudicated upon.'²¹⁹ This case brought to the surface the serious accusation of influencing the system of justice by some businessmen and lawyers which had the effect of undermining public confidence in the integrity and impartiality of the Malaysian Judiciary. Thirdly, on 1 July 1996, a High Court Judge, Syed Ahmad Idid, who was allegedly forced to resign and subsequently to leave for London on 2 July, published a 33 page pamphlet accusing twelve judges including Chief Justice Eusoff Chin and bringing 102 allegations against them (of which 99 were charges of corruption, 21 of abuse of power, and 52 of misconduct, immorality and three claims of payments of RM 50,000 with recipients graduating to taking millions from named business entities).²²⁰ No tribunal was set up under Article 125 of the Federal Constitution to look into these serious allegations²²¹ as it might have been believed: 'To sweep things under the carpet like this will only make matters worse.'²²² However, the Bar Council's call for the establishment of an 'independent Royal Commission to look into the administration of justice and propose, if need be, radical reform' went unheeded and unobserved. Furthermore, in November 1999 and in June 2000, the Malaysian Bar Council's attempt to convene Extraordinary General Meeting of its nationwide members to consider serious allegations of impropriety

²¹⁹ *Insas Bhd and Megapolitan Nominees Sdn Bhd v Ayer Molek Rubber Co Bhd and others*, [1995] 2 MLJ 734 (CA).

²²⁰ Roger Mitton, 'A Flurry of Questions about Malaysian Justice,' *Asiaweek*, July 1996.

²²¹ The Attorney-General Mohtar Abdullah, who was later in January 2002 appointed as a Federal Court Judge as a reward particularly for his role as the head of the public prosecution team against former Deputy Prime Minister Anwar Ibrahim, disclosed that the Police and the Anti-Corruption Agency found the judges clean and claimed that resignation of the whistle-blowing judge concerned was sufficient punishment for committing the crimes of 'highly seditious, defamatory and derisive.' Ibid.

²²² This comment was made by Advocate Khaled Nordin, a Member of the Parliament from UMNO. Ibid.

made against certain members of the judiciary and to call for either the appointment of a tribunal in accordance with Article 125 of the Federal Constitution to investigate into the conduct of the Chief Justice, Tun Eusoff Chin or the establishment of a Royal Commission of Enquiry to investigate into the matter respectively were thwarted on both occasions by the same Judge of the High Court, R.K. Nathan, on the applications of the same lawyer by granting injunctions to restrain the holding of the Bar Council's meetings in November 1999 and on 23 June 2000.²²³ In 2005, the Court of Appeal in *Majlis Peguam Malaysia and Ors v Raja Segaran*²²⁴, in which it was required to consider as to whether the Bar Council had the right to question the conduct of judges, more particularly that of Tun Eusoff Chin, decided the matter in the negative holding that to allow 'an open discussion on conduct of His Majesty's Judges could amount to questioning the wisdom of the King in his selection.' Furthermore, leave to appeal to the Federal Court was refused which prompted the Human Rights Commission (SUHAKAM) of Malaysia to make the following unhesitating comment: 'The Commission views with disquiet the discussion of the Federal Court on 11 October 2005 dismissing the Malaysian Bar Association's application for leave to appeal against the decision of the Court of Appeal.'²²⁵ Despite so many controversies over the conduct of Eusoff Chin, his term of office as the Chief Justice of Malaysia was extended for a further period of six months from 20 June 2000.²²⁶ Fourthly, in June 2001, Sabah High Court Judge Muhammad Kamil Awang, after cancelling the state assembly seat of Likas in Sabah, on Borneo island, won by Yong Teck Lee, a former Sabah Chief Minister, in election held in 1999 because of the presence of 'phantom

²²³ *Raja Segaran v Bar Council of Malaysia (No. 1)*, [2000] 1 MLJ 1 (HCM); *Raja Segaran v Bar Council of Malaysia (No. 2)*, [2001] 1 MLJ 472 (HCM).

²²⁴ [2005] 1 MLJ 15 (CA).

²²⁵ Media Statement titled 'SUHAKAM: Federal Court Lost An Opportunity', 14 October 2005.

²²⁶ International Bar Association, *Justice in Jeopardy: Malaysia, 2000* (unpublished), at p. 58; International Commission of Jurists, *Malaysia: Attacks on Justice*, 2002.

voters', alleged that he had been instructed by a superior court judge to strike off the election petitions without a hearing.²²⁷ This accusation has the oblique reference to the Chief Justice of Malaysia, Eusoff Chin as it was commented: 'CJ's may and/or can also give instructions [or advice] to judges on the cases they are hearing.'²²⁸

These kinds of improprieties in the state of affairs of the judiciary had the effect of seriously undermining and eroding the integrity and impartiality of the judges to such an extent that a reputed former Chief Justice deplored: 'When I am asked what I thought, my usual reply is that I wouldn't like to be tried by today's judges especially if I am innocent.'²²⁹

Under the abovementioned circumstances, the demand for the establishment of an independent Judicial Appointments Commission in Malaysia gained ground and found favour with the relevant quarters particularly the legal professions to ensure dispassionate scrutiny and eliminate political considerations in judicial appointments so that public confidence in the impartiality and independence of the judiciary can be restored and set to right. The Human Rights Commission of Malaysia, which was set up on 20 April 2000, recommended in 2005 for the establishment of an independent Judicial Appointments Commission to ensure transparency in the appointment process and enhance public confidence in the judiciary.²³⁰ But the proposal for the formation of such a Commission received a hostile and unfavourable response, from a person none other than the Chief Justice of Malaysia, Tun Dato Seri Ahmad Fairuz Bin Dato Sheikh Abdul Halim (who became CJ in 2003), first in November 2005 in an International Conference held in Philippines and then in an interview with the New

²²⁷ Supra note 183, at p. 154.

²²⁸ Charles Hector, 'Fortifying the Independence of the Judiciary', *Human Writes Issue* (An Infoline Pull-Out), 2 July 2003, at p. 6.

²²⁹ Centre for Public Policy Studies (CPPS), Policy Factsheet: Judiciary <<http://www.cpps.org.my/downloads/factsheets/Judiciary%20factsheet.pdf>> (accessed on 2 February 2010).

²³⁰ Report for the Universal Periodic Review on Malaysia, 4th Session, February 2009, From the Human Rights Commission of Malaysia, at p. 13.

Straits Times in February 2007 in Kota Baru after chairing a meeting with the Kelantan Judges. In the International Conference (held in Philippines), the Chief Justice said:

There have also been calls by some quarters that a Commission should be set up to deal with the appointment of judges in the superior courts. While that idea may be laudable, a commission to appoint judges does not necessarily guarantee judicial independence. The reverse may be true when members in the commission may well flex their muscles in the course of selecting candidates for later advantage. One argument advanced in favour of the present process is that since the appointing authority is the head of the elected representatives, judges are therefore appointed, albeit indirectly, in line with the wishes of the electors. Further the suggestion that the proposed commission should include civil servants and legal practitioners in its membership is incompatible with and would undermine the very basic concept of independence of the judiciary.

In my view the present system of appointment of judges in Malaysia had served well for the country since its independence. Change should not be made just for the sake of change. Under the present system it would appear that the Prime Minister has a major say in the appointment but in practice it is overall a process for consultation²³¹

In February 2007, the then Chief Justice in opposing the proposal for the establishment of an Independent Judicial Appointments Commission went to the extent of saying that: '... transparency should have its limits. Don't tell me when we are transparent, we have to be nude. That is not transparency, that's nudity. You want everything to be absolute? There is no such thing as absolute freedom or absolute

²³¹ Honourable Tun Dato Sri Ahmad Fairuz Bin Dato Sheikh Abdul Halim, 'Judicial Independence, Accountability, Integrity and Competence- Some Aspects of the Malaysian Position', presented during the International Conference and Showcase on Judicial Reforms held at the Shangri-la Hotel, Makati City, Philippines on 28-30 November 2005.

transparency. That's the way I look at things.'²³² This improper and indecorous comparison of the proposal for an Independent Judicial Appointments Commission, to ensure a more transparent process of appointment, with nudity by the Chief Justice displays his taste and frame of mind. The reasons for this antagonistic attitude of the Chief Justice towards the establishment of a Commission became distinct and crystal clear on 19 September 2007 when a video clip, recorded in 2002, showing senior lawyer V.K. Lingam's telephonic conversation with the then Chief Judge of Malaya (the Judiciary's third ranked post) Ahmad Fairuz Sheikh Abdul Halim on the urgency to get the latter appointed to the position of the President of the Court of Appeal (second in rank) and then Chief Justice of Malaysia- the highest judicial post in the country- was made public by the People's Justice Party. That the incumbent Chief Justice had been an overt beneficiary of the prevailing system of appointment was substantiated in the Report of the Royal Commission of Enquiry submitted to the Yang di-Pertuan Agong on 9 May 2008, thus:

In the final analysis, ... we are of the view that there was, conceivably, an insidious movement by Lingam with the covert assistance of his close friends ... to involve themselves actively in the appointment of judges, in particular, the appointment of Ahmad Fairuz as the Chief Justice of Malaya and subsequently as Court of Appeal President [which] had the effect of seriously undermining and eroding the independence and integrity of the judiciary as a whole.²³³

²³² *New Straits Times*, 21 February 2007; Lim Kit Siang, 'CJ Fairuz's poor taste in equating Judicial Appointments Commission to "nudity"', 22 February 2007 <http://www.malaysianbar.org.my/general_opinions/comments/cj_fairuzs_poor_taste_in_equating_judicial_appointments_commission_to_nudity.html> (accessed on 10 November 2010).

²³³ The Royal Commission of Enquiry on the Video Clip Recording of Images of a Person Purported to be an Advocate and Solicitor Speaking on the Telephone on Matters Regarding the Appointment of Judges (2008) Report, Vol.1, at pp 75-76. The Commission found evidence that several individuals, including the former Prime Minister and two former Chief Justices, were involved in the fixing of judicial appointments and judicial decisions. Other judges accepted gifts and bribes from Lingam and other key individuals. Shockingly, in one case, a judge's judgment was completely written by Lingam himself, who was a counsel for the plaintiff, Vincent Tan.

However, the Malaysian Bar Council's reaction to the issuance of the said Video-Clip, as expressed in its Extraordinary General Meeting held in November 2007, was not only to propose the terms of reference for a Royal Commission of Enquiry but also to call for the establishment of an independent Judicial Appointments and Promotions Commission. Perhaps taking into account the seriousness of the matter and its far-reaching implications on the judiciary, the then Prime Minister Datuk Seri Abdullah Ahmad Badawi (replaced by Datuk Seri Najib Razak as Prime Minister in March 2009) in April 2008, one month before the submission of Report by the Royal Commission of Enquiry's on the V.K. Lingam affair, announced the decision of the Government to set up a Judicial Appointments Commission. In order to ensure transparency in the method of judicial appointment to the superior courts, much expected Judicial Appointments Commission Bill was placed before the Parliament on 10 December 2008. It is pertinent to mention here that, the initial response of the Cabinet to the draft Bill was not positive; the Cabinet meeting held in July 2008 witnessed the opposition of several UMNO Ministers as to the size (consisting of 13 members) of the proposed Commission and as to the curtailment of the powers of the Prime Minister regarding judicial appointments.²³⁴

However, the Judicial Appointments Commission Bill was approved by the Cabinet at its weekly meeting held on 9 November 2008 in which new Law Minister Mohamed Nazri Abdul Aziz gave a satisfactory and convincing answer to the question raised by his colleagues stressing the fact that the size of the Commission has been reduced from 13 to nine Members.²³⁵ The Bill, placed on 10 December 2008 before the House of Representatives, the Lower House of the Parliament, was passed on 17 December

²³⁴ Cabinet approves Judicial Appointments Commission
http://www.themalaysiainsider.com/index.php/malaysia/12957_cabinet_approves_judicial_appointments_commission (accessed on 10/11/2009).
²³⁵ Ibid.

2008. Then the Bill was tabled in the Upper House of the Parliament, Senate, on 22 December and was approved on the next day, 23 December 2008.²³⁶ The passing of the Bill by the House of Representatives within eight days of its initiation and approval by the Senate within two days of its introduction demonstrate that the Bill, concerning the establishment of an important body to ensure transparency in the judicial appointments, was not passed after adequate deliberation, thoughtful debate or meaningful discussion to maximise reasons and minimise the defects of the Bill. However, a very few former Justices and Judges, namely former Chief Justice, Tun Mohamed Dzaiddin Abdullah (who was the Chief Justice from 20 December 2000 to 15 March 2002) and a former High Court Judge Dato Syed Ahmad Idid, who was allegedly forced to resign in July 1996 for publishing a pamphlet accusing the incumbent Chief Justice and eleven other judges of corruption, abuse of power and misconduct, hailed the Government for eventually introducing the Bill for establishing a Judicial Appointments Commission as a step forward to 'improve the process of appointing judges' and as a means to ensure the selection of 'the right candidates to be judges' respectively.²³⁷ The Judicial Appointments Commission Bill, passed by the Parliament, received the Royal Assent on 6 January 2009. The Judicial Appointments Commission Act, 2009 came into force on 2 February 2009²³⁸ which provides 'for the establishment of the Judicial Appointments Commission in relation to the appointment of judges of the superior courts, to set out the powers and functions of such Commission, to uphold the continued independence of the judiciary, and to provide for matters connected therewith or incidental thereto.'²³⁹ Under the

²³⁶ Annual Report of the Judicial Appointments Commission, 2009, at p. 5
²³⁷ http://www.jac.gov.my/application/laporantahunan/lt2009_bi.pdf (accessed on 14 November 2010).
²³⁸ 'JAC Bill does not affect constitutional status of Sabah', *Daily Express*, 18 December 2008
²³⁹ www.dailyexpress.com.my/news.cfm?NewsID=61757 (accessed on 11/11/2009).

P. U. (B) 43/2009.
²³⁹ As contained in the broad title of the Judicial Appointments Commission Act, 2009.

Act, the Judicial Appointments Commission has been empowered to deal with 'the appointments of judges of the Federal Court, Court of Appeal and High Court and judicial commissioners and shall include the appointments of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak made on or after the commencement of this Act.'²⁴⁰

C.2. Composition of the Commission

The Judicial Appointments Commission Act, 2009 provides that the 'Commission shall consist of the following members:

- a) the Chief Justice of the Federal Court who shall be the Chairman;
- b) the President of the Court of Appeal;
- c) the Chief Judge of the High Court in Malaya;
- d) the Chief Judge of the High Court in Sabah and Sarawak;
- e) a Federal Court judge to be appointed by the Prime Minister; and
- f) four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies.'²⁴¹

Thus the Commission is composed of nine members who are of two types: ex-officio and non ex-officio. The number of ex-officio members from the three superior courts- the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah

²⁴⁰ Section 1(3), the Judicial Appointments Commission Act, 2009.

²⁴¹ Section 5(1), *ibid*.

and Sarawak- is four, whereas the number of non ex-officio members is five to be appointed by the Prime Minister. Of the five non ex-officio members, one is to be a judge of the Federal Court to be appointed by the Prime Minister at his sole discretion without consulting any relevant person or authority while other four non ex-officio members are to be 'eminent persons', not being 'members of the executive or other public service', who are to be appointed by the Prime Minister after consultation, not concurrence, with various stakeholders in the administration of justice, namely, (i) the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies. Thus the Prime Minister appoints the majority of the members of the Commission- five out of nine- and in doing so he is more likely to be swayed by political allegiance of the persons concerned. This leaves the door wide open for selecting candidates by the Judicial Appointments Commission in deference to the Prime Minister's covert wishes for vacancies in the superior courts and, as such, the very purpose of setting up of the Commission, independent of the Prime Minister, for a fair, independent and impartial selection is tend to be defeated. The position may eventually go from bad to worse if the Prime Minister exercises, under the Act, the power of appointing 'any person he deems fit to fill the vacancy ... created [out of death, conviction, bankruptcy, insanity, resignation, absence from three consecutive meetings of the Commission without leave of the Prime Minister] for the remainder of the term vacated by the member or for the interim period until a new person is appointed to the office or the position held by that member prior to his vacating the office or position.'²⁴²

²⁴² Section 10(2), *ibid.*

Therefore, in view of the fact that the prerequisite independence of the Judicial Appointments Commission precludes appointment of its members by a political authority like the Prime Minister involving the risk of party-political bias in the appointment of judges, it may be suggested that provisions for the appointment of non ex-officio members of the Commission may be replaced with those of the appointment of the immediately retired Chief Justice of the Federal Court, the President of the Court of Appeal and Chief Judge of the High Court in Malaya/the Chief Judge of the High Court in Sabah and Sarawak (by rotation) and two Deans of the Faculties of Law of the recognised Universities in Malaysia (in alphabetical order of the name of the Universities). The Chairman of the Judicial Appointments Commission should be given the power to fill in casual vacancy in the Commission as the Chief Justice of Namibia has been empowered by the Constitution to fill in any casual vacancy in the Judicial Service Commission.²⁴³

C.3. Establishment of the Judicial Appointments Commission

However, the Judicial Appointments Commission has been constituted for the first time in the history of Malaysia on 11 February 2009 with Chief Justice Tan Sri Zaki Azmi as the ex-officio Chairman, and the Court of Appeal's President Tan Sri Alauddin Mohd Sheriff, Chief Judge of Malaya Datuk Arifin Zakaria and Sabah and Sarawak Chief Judge Tan Sri Richard Malanjum as its ex-officio members. The five non ex-officio members appointed to the Commission by the Prime Minister are Federal Court Judge Datuk Zulkefi Ahmad Makinuddin and four eminent persons namely former Chief Justice, Tun Abdul Hamid Mohamed, former Chief Judge of Sabah and Sarawak Tan Sri Steve Shim Lip Kiong, former High Court Judge Tan Sri

²⁴³ Article 85(4) of the Constitution of Namibia, 1990 provides that 'Any casual vacancy in the Judicial Service Commission may be filled by the Chief Justice or in his or her absence by the Judge appointed by the President.'

L. C. Vohrah and former Attorney- General Dato' Seri Ainum Mohd Saaid.²⁴⁴ Thus no senior law Professor of recognised merit having knowledge of the legal profession has been included in the Commission from the category of eminent persons.

It is pertinent to mention here that the present ex-officio Chairman of the Judicial Appointments Commission, Tan Sri Zaki Azmi, who had been a former legal adviser to the UMNO and had served the Party's Election Committee as Chairperson and Deputy Chairperson respectively, was appointed as the Chief Justice of Malaysia on 16 October 2008 only about one year after his direct appointment to the Federal Court in September 2007, bypassing the convention of first serving in the High Court and the Court of Appeal. Thus the apprehension and concern of a Parliament Member, expressed in the Parliament in 2007 and during the Royal Address in Parliament on 6 May 2008, about his appointment as the Chief Justice came true. As the Parliament Member said:

Will the Judicial Appointments Commission be formed in time to influence the appointment of the next Chief Justice in less than six months to ensure that the country does not have another infamous first, in having the first UMNO Chief Justice?

In the last Parliament, I had questioned the fast-track elevation of Tan Sri Zaki Tun Azmi in the judiciary, with his unprecedented triple jump to become Federal Court judge last September without ever being a High Court or Court of Appeal judge, then quadruple jump in three months as Court of Appeal President, and whether this is to be followed by quintuple jump in a matter of a year to become the next Chief Justice

²⁴⁴ Zaki Azmi is Chairman of Judicial Appointments Commission
www.themalaysianinsider.com/index.php/malaysia/1854-zaki-azmi-is-chairman-of-judicial-appointments-commission (accessed on 10/11/2009).

when Datuk Abdul Hamid Mohamed steps down from the topmost judicial post in October.²⁴⁵

Then the Member put forward a question to the Prime Minister as to the appointment of next Chief Justice through the Judicial Appointments Commission: 'Is the Prime Minister prepared to make a public commitment that the appointment of the next Chief Justice will be first referred to the Judicial Appointments Commission, which he has agreed to set up?'²⁴⁶

Therefore, it seems that the appointment of Zaki Azmi as the Chief Justice of the Federal Court in October 2008, between the Cabinet's disapproval of the draft Judicial Appointments Commission Bill in July 2008 and approval in November 2008, was a calculated move to head the proposed Judicial Appointments Commission with a person of political allegiance in order to influence the selection process for having patronage appointments in the superior courts of Malaysia. Furthermore, the appointment of a former Chief Justice (previously Lord President) Tun Hamid Omar, who drew widespread criticism for his meeting in private with the Chief Executive of a Company whose case was pending before the Supreme Court and against whom the Malaysian Bar Council passed a resolution to boycott his court after his appointment as a regular Lord President, reinforces mistrust and scepticism in the impartiality of the Commission.

²⁴⁵ Lim Kit Siang Online, On Judicial Reform, 7 May 2008 < <http://blog.limkitsiang.com/2008/05/07/on-judicial-reform/>> (accessed on 9 February 2010).

²⁴⁶ Ibid.

C.4. Functions and Powers of the Commission

The main 'functions of the Commission are-

- a) to select suitably qualified persons who merit appointment as judges of the superior court for the Prime Minister's consideration;
- b) to receive applications from qualified persons for the selection of judges to the superior court; [and]
- c) to formulate and implement mechanisms for the selection and appointment of judges of the superior court.²⁴⁷

The Commission, which meets every month, discusses, subjects other than the selection and appointment of judges, the disposal of cases and improving the performance of superior court judges.²⁴⁸

C.5. Selection Criteria

A candidate is qualified for selection as a judge of the High Court, as mentioned earlier, if he fulfils the requirements laid down in Article 123 of the Federal Constitution.²⁴⁹ Since the functions performed by judges demand the qualities of independence, impartiality, honesty, integrity, high legal acumen and sound knowledge of law, the Judicial Appointments Commission Act, though not required by the Constitution, has spelled out the following criteria to take into account by the Commission in selecting candidates for appointment:

- a) integrity, competency and experience;
- b) objective, impartial, fair and good moral character;

²⁴⁷ Section 21(1), the Judicial Appointments Commission Act, 2009.

²⁴⁸ In the Forward from the Chairman in the Judicial Appointments Commission's Annual Report, 2009.

²⁴⁹ Section 23(1), *ibid.* The constitutional requirements are: i.e. citizenship, ten years experience as an advocate of the High Courts or as a member of the judicial and legal service of the Federation or of the legal service of a state.

- c) decisiveness, ability to make timely judgments and good legal writing skills;
- d) industriousness and ability to manage cases well; and
- e) physical and mental health.²⁵⁰

The enumeration of certain important criteria of honesty, fairness, good health, strong achievement, aptitude, knowledge and the ability to write judgments in time is a positive development in line with the modern trend of specifying certain benchmarks to be found in some of the constitutions of the world for selecting in a holistic manner the best candidates as judges. For example, the Constitution of the Islamic Republic of Comoros provides that the members of the Supreme Court shall be chosen on the basis of their competence, their integrity and their knowledge of law.²⁵¹ Jurist like Chief Justice Dickson (of Canada) also looks for in a good judge the five qualities of: integrity, equanimity, legal knowledge, patience and common sense.²⁵²

However, a serving judge or judicial commissioner must be disqualified for appointment if he has three or more pending judgments or unwritten grounds of judgments that are overdue by sixty days or more from the date they are deemed to be due.²⁵³ Such a provision is also to be found in the 1994 Code of Ethics, adopted by the Yang di-Pertuan Agong on the recommendation of the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Court, after consulting the Prime Minister in pursuance of the Constitution (Amendment) Act, 1994, which provides that judges should not inordinately and without reasonable explanation delay in the disposal of cases, the delivery of decisions and the writing of grounds of judgments. Despite these provisions, the justification of incorporating

²⁵⁰ Section 23(2), *ibid.*

²⁵¹ Article 32(6), the Constitution of the Islamic Federal Republic of the Comoros, 1978.

²⁵² Garry Sturgess and Phillips Chubb, *Judging the World Law and Politics in the World's Leading Courts* (Sydney: Butterworths, 1988) at p. 148.

²⁵³ Section 23(3), the Judicial Appointments Commission Act, 2009.

similar provisions into the Judicial Appointments Commission Act demonstrates Government's seriousness to address past public criticisms regarding the appointment/promotion of a High Court Judge to the Federal Court in August 2007 'who had not submitted written judgments in 33 cases',²⁵⁴ of which in three cases, death sentences were passed against the accused.

C.6. Selection Process/Procedure

In exercise of the powers conferred²⁵⁵ by the Judicial Appointments Commission Act, 2009, the Prime Minister, on the recommendation of the Commission formulated the Judicial Appointments Commission (Selection Process and Method of Appointment of Judges of the Superior Courts) Regulations 2009, which came into effect on 1 June 2009, in order to achieve the underlying objectives of the parent law, i.e. to ensure transparency in the selection process as well as to select the best candidates for appointment of judges in the superior courts of Malaysia. Previously nothing was known to anybody from the day of proposing a person for judicial appointment till the issuance of the warrant except to the persons who were involved in it. The newly adopted Regulations provide for a detailed transparent procedure to be followed by the Judicial Appointments Commission from the advertisement of the judicial vacancies to the consideration and recommendation of persons for appointment by the Commission.

C.6.1. Advertisement of Vacancy

The Judicial Appointments Commission has been given the discretion as to 'advertise in the Commission's website or in any other medium the Commission deems

²⁵⁴ SUARAM, Overview of the Malaysian Civil and Political Rights, Kuala Lumpur, December 2007, at p. 15.
²⁵⁵ Section 30, Judicial Appointments Commission Act, 2009.

appropriate to fill any vacancy in the office of a judge²⁵⁶ and the advertisement, *inter alia*, shall state: '....b) the requirement under Article 123 of the Federal Constitution; c) the experience, academic qualification and other qualification required; [and] d) the remuneration and allowances.'²⁵⁷

C.6.2. Vacancies in the High Courts

Any citizen having the experience of practising in a High Court as an advocate for ten years or of a member of the judicial and legal service of the Federation or of a state for the same period (i.e. ten years) may apply for selection as a judge of the High Court.²⁵⁸ Only the qualified serving judicial and legal service officer is required to submit the application to the Commission through the head of the department, who 'shall forward the application to the Commission together with the relevant service information and a statement as to whether he supports the application or otherwise.'²⁵⁹

C.6.3. Vacancies in the Federal Court and the Court of Appeal

But in case of the vacancies in the Federal Court and the Court of Appeal, the following persons have been entrusted with the core responsibility of identifying and proposing suitable 'names' to the Commission for selection:

- 1)
 - a) the retiring Chief Justice, for vacancy in the office of Chief Justice;
 - b) the Chief Justice and the retiring President of the Court of Appeal, for vacancy in the office of President of the Court of Appeal;

²⁵⁶ Regulation 3(1), the Judicial Appointments Commission (Selection of Judges of the Superior Courts) Regulations, 2009.

²⁵⁷ Regulation 3(2), *ibid.*

²⁵⁸ Regulation 4(1), *ibid.*

²⁵⁹ Regulation 4(3), *ibid.*

- c) the Chief Justice and retiring Chief Judge of the High Court in Malaya or the retiring Chief Judge of the High Court in Sabah and Sarawak, as the case may be, for vacancy in the office of Chief Judge of the High Court in Malaya or Chief Judge of the High Court in Sabah and Sarawak;
- d) the Chief Justice, for vacancy in the office of judge of the Federal Court; and
- e) the Chief Justice and President of the Court of Appeal, for vacancy in the office of judge of the Court of Appeal.

2) Notwithstanding subregulation (1), the Commission may consider names proposed by eminent persons who have knowledge of the legal profession or who have achieved distinction in the legal profession in respect of vacancies in the Federal Court and the Court of Appeal.²⁶⁰

Thus it is a very rare arrangement that the initiations of the proposals for selecting the candidates for vacancies in the offices of the Chief Justice of Malaysia (i.e. head of the Federal Court), President of the Court of Appeal, Chief Judge of the High Court in Malaya and Chief Judge of the High Court in Sabah and Sarawak have been given to the retiring, not retired, heads of three superior courts respectively- the retiring Chief Justice, the President and Chief Judges- who are, through their long association with the respective court, conversant and best equipped to assess objectively the attributes of their fellow colleagues for proposing the names of their successors in office.

But the Chief Justice of Malaysia, the head of the Malaysian Judiciary and paterfamilias of the judicial fraternity, has also been given, following the constitutional scheme, the role of proposing names to the Commission for selection against the vacancies of the President of the Court of Appeal, and the Chief Judges of

²⁶⁰ Regulation 5, *ibid.*

the two High Courts. Furthermore, he has been empowered, not only to propose the names against vacancies in the office of the judges of the Federal Court, but also, along with the President of the Court of Appeal, for the vacant posts of judges of the Court of Appeal. For, he is in a better position to know the functional suitability of the candidates in terms of experience or knowledge of law, ability to handle cases, firmness and fearlessness requisite for appointment as superior court judges for ensuring dispassionate and objective adjudication. It is expected that the incumbent Chief Justice of Malaysia, President of the Court of Appeal and retiring heads of the three superior courts shall not be imperceptibly influenced by extraneous or irrelevant considerations and shall be free from bias, predilection or inclination in proposing names of the suitable candidates for appointment on the bench. Perhaps taking into account the nature and importance of judicial appointment, plurality of sources of proposing competent candidates from outside judiciary have been provided for: eminent persons having knowledge of the legal profession or achieved distinction in the legal profession have been empowered to propose names for the consideration of the Judicial Appointments Commission in respect of vacancies in the Federal Court and the Court of Appeal. Thus there is the scope for the stalwart in legal profession to be associated with the selection process for judicial appointment. This is line with the Indian Bar Council's opinion that

of all the segments of the society, the members of the Bar are pre-eminently suited to judge persons who should be appointed as Judges' of the superior courts and therefore, 'any reform or modification in the model for selection and appointments of

Judges must provide for adequate representation of the organized bar in the mechanism.²⁶¹

C.6.4. Vetting and Screening the Application or Proposal for Appointment in the Superior Courts

Upon receiving an application or proposal, the Secretary to the Commission shall, inter alia, 'vet the application or proposal to ensure that the applicant or candidate is qualified under Article 123 of the Federal Constitution.'²⁶² Then he shall, as soon as may be practicable, send the names of those candidates who have fulfilled the selection criteria laid down in Section 23 of the Act to the following agencies for screening:

... (1)

a) Malaysian Anti Corruption Commission;

b) Royal Malaysia Police;

c) Companies Commission of Malaysia; and

d) Department of Insolvency Malaysia.

(2) An agency specified in subregulation (1) shall, within seven days from the date of the receipt of the request from the Secretary, forward its report to the Commission.

(3) After receiving all the reports from the agencies specified in subregulation (1), the Secretary shall proceed to prepare a deliberation paper on each applicant and

²⁶¹ The opinion was expressed by the Bar Council of India in 1979. 'National Commission to Review the Working of the [Indian] Constitution', A Consultation Paper on Superior Judiciary, 26 September 2001 <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm> (accessed on 9 February 2010).

²⁶² Regulation 7(1)(b), the Judicial Appointments Commission (Selection of Judges of the Superior Courts) Regulations, 2009.

proposed person who has passed the screening process by the agencies for the selection process by the Commission.²⁶³

Thus the transparent process of selection involves two parts, namely the screening of the antecedent or background of the candidates and ascertaining the suitability of the candidates for judicial appointment on the basis of fitness and competence. The initial investigation of potential judicial candidates by the four agencies of (a) Malaysian Anti Corruption Commission, (b) Royal Malaysia Police, (c) Companies Commission of Malaysia, and (d) Department of Insolvency Malaysia to verify their educational qualification, financial position statement, tax payment record and credit history as to arrest and conviction may be compared with the crucial investigation of the prospective judicial candidates done by the US Federal Bureau of Investigation (FBI) on receipt of three names from the Office of Policy Development (OPD) of the Department of Justice (supervised and directed by the Attorney General) after its positive preliminary evaluation.²⁶⁴ However, the Secretary to the Commission prepares a deliberation paper on each of the candidates, about whom the relevant agencies have given satisfactory and positive reports, for the consideration of selection by the Commission.

C.6.5. Selection Meeting

The Chairman of the Judicial Appointments Commission- the Chief Justice of Malaysia- shall preside over the selection meeting²⁶⁵ 'except where the selection

²⁶³ Regulation 8, *ibid.*

²⁶⁴ The names of the candidates are also sent to the American Bar Association (ABA) for assessing their qualifications including temperament. The ABA's informal piece of advice to the Department of Justice on the rating of the candidates states: 'well qualified', 'qualified' or 'not qualified.' If the ABA rating is positive, the FBI report is satisfactory and the Department of Justice's evaluation is favourable, then the Attorney General formally recommends the nomination to the President.

²⁶⁵ Section 13(3), the Judicial Appointments Commission Act, 2009.

meeting is to consider the selection of persons for vacancies in the High Courts.²⁶⁶ It seems unjustifiable to disqualify the Chairman of the Commission from presiding over the selection meeting to consider selection of candidates for the lowest tier of superior courts (the High Court) and to require him to nominate 'a judge from amongst the members of the Commission to be the Chairman'²⁶⁷ of such a selection meeting. As to the quorum of the selection meeting of the Commission, the Act in Section 13(4) provides that the quorum of the Commission shall be seven including the Chairman. But in another place of the Act, it has been provided that 'The quorum for every selection meeting shall be seven'²⁶⁸ without any reference to the Chairman. Taking into account the facts that it may be a difficult task in reaching quorum requirement of seven in selecting the candidates for the posts of the Chief Justice of Malaysia and President of the Court of Appeal, for example, if the names of three ex-officio members of the Commission- the President of the Court of Appeal, Chief Judge of Malaya, Chief Judge of Sabah and Sarawak- and of the nominated Federal Court Judge, are considered for the position of the Chief Justice, they would be 'disqualified from attending or participating in a selection meeting'²⁶⁹ and if any of the members of the Commission is related or connected to any candidate he would also be disqualified from attending such a meeting, it has further been provided that 'then the quorum shall not be less than five.'²⁷⁰ 'Every member of the Commission present shall be entitled to one vote by secret ballot and in the event of a tie in the number of votes casted, the Chairman or the member of the Commission presiding as the Chairman for the meeting shall have a casting vote'²⁷¹ and the selection shall be

²⁶⁶ Section 24(1), *ibid.*

²⁶⁷ Section 24(2), *ibid.*

²⁶⁸ Section 24(4), *ibid.*

²⁶⁹ Section 25, *ibid.*

²⁷⁰ Section 13(5), *ibid.*

²⁷¹ Section 13(6), *ibid.*

made 'by majority decision'²⁷² i.e. on the basis of the majority of votes received. But if the Commission invites 'any person to attend a meeting of the Commission for the purpose of advising it on any matter under discussion, then that person shall not be entitled to vote at the meeting.'²⁷³ In a selection meeting, the Commission shall:

- a) 'select not less than three persons for each vacancy in the High Court; or
- b) select not less than two persons for each vacancy where the vacancy is for judges of the superior courts other than the High Court.'²⁷⁴

After receiving the report of the Commission as to the selection of the candidates for the appointment to the office concerned containing reasons for selection and necessary information²⁷⁵, the Prime Minister may 'request' for two more names to be selected and recommended for his consideration with respect to any vacancy to the office of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya, the Chief Judge of the High Court in Sabah and Sarawak, judges of the Federal Court and the Court of Appeal, and the Commission [which maintains reserve candidates for this purpose] shall, as soon as may be practicable, comply with the request in accordance with the selection process as prescribed in the regulations made under this Act.'

Thus the Judicial Appointments Commission, which has been given the authority to vet and select the best candidates taking into account the selection criteria as laid down in Article 123 of the Federal Constitution and Section 23 of the Judicial Appointments Commission Act, 2009, requires unjustifiably to propose varying number of minimum candidates: not less than three candidates for each vacancy of

²⁷² Section 24(5), *ibid.*
²⁷³ Section 13(7), *ibid.*
²⁷⁴ Section 22(2), *ibid.*
²⁷⁵ Section 26(1), *ibid.*

the High Court Judge and not less than two persons for each vacancy of the Federal Court Judge and the Court of Appeal Judge. Again the Prime Minister may require the Commission to select and recommend two more names for his consideration, not for an appointment against a vacant post of the High Court, but only for appointment to an office bearer position of the three superior courts- the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak- and judges of the Federal Court and the Court of Appeal. The Commission is required to comply with such a request from its reserve candidates as soon as may be practicable. Thus the Prime Minister is empowered to reject the well considered selection of two candidates by the Commission for vacant positions of the office bearers of three superior courts and judges of the Federal Court and the Court of Appeal without any obligation to make his reasons for such a rejection known to the Commission and request for two additional names without assigning any reasons whatsoever. Generally it is expected that the Commission will recommend the best two suitably candidates available for the first instance against those vacant posts and being requested for two additional names it shall comply with the request from the 'reserve candidates'²⁷⁶ who may be of comparatively less appropriate candidates. The provision for providing the Prime Minister with the multiple choices of four candidates for appointment to the each office bearer position of the Federal Court, the Court of Appeal and two High Courts and each vacant post of judges of the Federal

²⁷⁶ As Regulation 9, the Judicial Appointments Commission (Selection Process and Method of Appointment of Judges of the Superior Courts) Regulations, 2009 provides that '1) In selecting candidates to be recommended for appointment to the superior courts, the Commission shall ensure that reserve candidates are available for purposes of complying with any request that may be made by the Prime Minister under section 27 of the Act. 2) Upon receiving a request from the Prime Minister under section 27 of the Act, the Commission shall submit the names of the reserve candidates and its report under section 26 of the Act.'

Court and the Court of Appeal is incompatible and inconsistent with the very purpose of establishing the Commission as an effective and meaningful selecting body.

C.6.6. Tender of Advice

As to the acceptance of the candidates recommended by the Commission for Prime Minister's consideration, the Judicial Appointments Commission Act provides that: 'Where the Prime Minister has accepted any of the persons recommended by the Commission, he may proceed to tender his advice in accordance with Article 122B of the Federal Constitution.'²⁷⁷

Thus it is not explicitly and unequivocally stated that the Prime Minister must accept only those candidates recommended by the Commission for proceeding to tender his advice to the Yang Di Pertuan Agong under Article 122B of the Federal Constitution. Because of the using of vague and imprecise words of 'where the Prime Minister has accepted any of the persons recommended by the Commission', it appears that the Prime Minister is not bound to recommend to the Head of the State after consulting the Conference of Rulers from among those candidates shortlisted by the Judicial Appointments Commission for appointment in the vacant posts of judges of the Superior Courts. If the Prime Minister is free to accept or reject the recommendation of the Commission, then there is little point and justification in having such a 'toothless tiger.'

C.7. Independence of the Commission

The kernel and success of the Judicial Appointments Commission lie in its independence. The member of the Judicial Appointments Commission is expected to perform their function of selection and recommending suitable persons for judicial

²⁷⁷ Section 28, the Judicial Appointments Commission Act, 2009.

appointment without submitting to their personal likeness or dislikeness and improper influences, inducements, pressures, threats or interferences from any quarter except toeing the line with the constitutional and legal criteria and the commands of their conscience. The Commission will only be as independent as the members of which it is composed of. The question of independence of the Commission is inextricably linked with, apart from the method of appointment, its members' security of tenure, salaries and other terms and conditions of service.

The empowering of the Prime Minister to appoint majority of the members of the Judicial Appointments Commission (five out of nine) is, as it seems, deliberately designed to staff the Commission with pro-Government people to retain his grip over the judicial selection and recommendation process. Furthermore, the four out of five appointed (except appointed Federal Court Judge) members of the Commission from the category of 'eminent persons' have not been given the security of tenure, the most fundamental of the guarantees of independence of the members of the Commission for enabling them to perform their functions without fear of the consequences regardless of whether their job or actions do not please the Prime Minister or some other person. For the appointment of any of the four eminent persons as members 'may at any time be revoked by the Prime Minister without assigning any reason.'²⁷⁸ Thus the four non ex-officio members of the Commission (indeed eminent persons), who are appointed 'for a period of two years and are eligible for reappointment'²⁷⁹ for another term only, cannot be expected to acquire that habit of independence in discharging their duties without fear or favour requisite in their office if their grounds of removal are not clearly specified and their removal procedure is not made a

²⁷⁸ Section 9(1), the Judicial Appointments Commission Act, 2009.
²⁷⁹ Section 6(1), *ibid*.

difficult process involving careful consideration by an independent body other than the Prime Minister.

Furthermore, all the members of the Commission have not been given the security of providing them with adequate allowances and appropriate privileges during their terms of office. For, the 'members of the Commission shall be paid such allowances as the Prime Minister may determine'²⁸⁰ which implies that the Prime Minister has not only given the absolute and unfettered power to determine the amount of allowances for the Commissioners but also to alter the amount of allowances to their disadvantages. Taking these realities into account, the Constitution of the Sovereign Democratic Republic of Fiji, 1990 has aptly vested the power with the Parliament to fix allowances for the members to the Judicial Service Commission.²⁸¹

On top of it, the Judicial Appointments Commission Act contains a very unusual stipulation as to the amendment of its provisions in Section 37 which provides that:

1. The Prime Minister may, whenever it appears to him necessary or expedient to do so, whether for the purpose of removing difficulties or preventing anomalies in consequence of the enactment of this Act, by order published in the *Gazette* make such modifications to any provisions of this Act as he thinks fit.
2. The Prime Minister shall not exercise the powers conferred by this section after the expiration of two years from the date of coming into operation of this Act.
3. In this section, 'modifications' includes amendments, additions, deletions, substitutions, adaptations, variations, alteration and non-application of any provisions of this Act.

²⁸⁰ Section 37, *ibid*.

²⁸¹ Article 131(3), the Constitution of the Sovereign Democratic Republic of Fiji, 1990.

Thus the Parliament, which has passed the Judicial Commissions Act, has been deprived of its inherent power of modifications, including 'amendments, alteration and non-application of any provisions of this Act,' to remove the defects of the Act after its coming into force with a view to improve the existing arrangement keeping pace with changing needs of time. The power of modifications has been completely given to the Prime Minister in the two years of the coming into operation of the Act by ministerial order usurping the power of the Parliament.

Therefore, it appears that the provisions of the Judicial Appointments have been carefully crafted to incapacitate the members of the Commission, particularly the members appointed from the category of eminent persons, from performing their functions of selecting and recommending candidates for appointment as judges of the superior courts independently and 'to uphold the continued independence of the judiciary' without paying any attentions to the wishes and desires of the Prime Minister.

D. Whether the Judicial Appointments Commission Act is a Valid Piece of Legislation?

The Federal Constitution of Malaysia provides for a detailed procedure in Articles 122B, 122, 122(1A) and 122AB, as mentioned earlier, for the appointment judges of three superior courts, appointment of additional judges in the Federal Court and appointment of Judicial Commissioners in the High Court in Malaya and the High Court in Sabah and Sarawak respectively by the Yang di-Pertuan Agong acting on the advice of, and, after consulting the designated constitutional functionaries. The qualifications for the appointment of judges in the superior courts of the Federal Court, Court of Appeal and of High Courts have been, as stated earlier, outlined in Article 123 of the Constitution. The Federal Constitution neither

contemplates of establishing any Judicial Appointments Commission for selecting candidates for the consideration of the Prime Minister with respect to judicial appointment in superior courts nor does it empower the Parliament to enact law determining the organisation, powers and functioning of the Commission, a power which has been given to the Parliament in the Constitution of Algeria, 1989, the Constitution of France, 1958, the Constitution of Italy, 1947, the Constitution of Namibia, 1990, the Constitution of Sudan, 1998 and the Constitution of Rwanda, 2003.²⁸² The Constitution of Malaysia has also not empowered the Parliament to pass any law prescribing additional qualifications for the appointment of judges of superior courts as it is to be found in Article 95(2) of the 1972 Constitution of Bangladesh.²⁸³ Furthermore, the Constitution has given the Prime Minister unfettered prerogative of exploring any number of candidates for each judicial vacancy. Therefore, it can be strongly argued that the enactment of the Judicial Appointments Commission Act, 2009 providing for the establishment of a Judicial Appointments Commission, prescribing selection criteria and limiting Prime Minister's choice to three candidates for the appointment of judges in the High Courts and ultimately (2 + 2 =) four candidates for appointment as judges of the Federal Court and the Court of Appeal is unconstitutional. For, the Parliament cannot assume a power which has not been conferred on it by the Constitution itself. Furthermore, the establishment of the Judicial Appointments Commission under an ordinary Act of the Parliament consisting of, *inter alia*, the Chief Justice of the Federal Court, the

²⁸² Article 155 of the Constitution of Algeria, 1989, provides that 'The High Council Magistracy decides, within the conditions defined by the law, the appointment, transfer and the progress of the magistrate's careers.' Article 65 of the Constitution of France states that 'An institutional Act shall determine the member in which this article [dealing with the jurisdiction and powers of the High Council of the Judiciary concerning appointment and disciplining the judges and public prosecutors] is to be implemented.' Article 105 of the Constitution of Italy, 1947, lays down that 'The superior council of the judiciary, as defined by organizational law, has the exclusive competence to appoint, assign, move, promote and discipline members of the judiciary.' Article 102(2) of the Constitution of Sudan, 1998, provides that 'The Judiciary shall have a council to be known as the "the Supreme Council of the Judiciary", its composition and functions shall be prescribed by law.' Article 158 of the Constitution of Rwanda, 2003 stipulates that 'An organic law shall determine the organization, powers and functioning of the Supreme Council of the Judiciary.'

²⁸³ After laying down the criteria of citizenship and 10 years of experience as an Advocate of the Supreme or Court or holding judicial office for 10 years, Article 95(2)(c) as an alternative requirement speaks of 'such other qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.'

President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak as ex-officio members, has given rise to an over-lapping exercising of power under the Federal Constitution regarding judicial appointment in superior courts. For, after receiving the names of the candidates recommended by the Commission, the Prime Minister is required under the Constitution to consult again the Chief Justice of the Federal Court before tendering his advice to Yang di-Pertuan Agong for the appointment of all the judges of the superior court (Federal Court), consult the President of the Court of Appeal for the appointment of judges to the Court of Appeal and consult each of the Chief Judges of the two High Courts for appointing puisne judges to the High Court concerned. This will enable the heads of the superior courts, particularly the Chief Justice of Malaysia who is a common consultee in appointing all judges of superior courts, to express their personal impression and point of view for the second time as to the suitability of the candidates having disagreed with the Commission's decision taken in the selection meeting.

However, it should be stressed here that the present world shows a tendency to invest an independent nominating body (Commission or Council) with the power of selecting and recommending best candidates to the Head of the State for judicial appointment. For, the principles on the independence of judiciary, formulated and adopted by various international and regional organisations, particularly in the 1980s and thereafter²⁸⁴, favour the appointment of judges of superior courts by, on the recommendation, proposal/advice of, or after

²⁸⁴ See Article 3, the Text of the Lagos Conference of the International Commission of Jurists, 1961, Article 10(d), the Principles and Conclusions on the Independence of the Judiciary in the LAWASIA Region, 1982, Article 3(a), the International Bar Association's Minimum Standards of Judicial Independence, 1982, Article 2.14(b), the Universal Declaration on the Independence of Justice, 1983, Article 10, the UN Basic Principles on the Independence of the Judiciary, 1985, Article 14, Beijing Statement of Principles on the Independence of the Judiciary in LAWASIA Region, 1995 and Article II(1), the Latimer House Guidelines for Parliamentary Supremacy and Judicial Independence in the Commonwealth, 1998.

consultation with an appropriately constituted and representative judicial body.²⁸⁵ In very recent times, the Constitutions of some of the countries of the world have been amended to provide for the establishment of an independent body for selection and recommendation of duly qualified persons for appointment of judges in the superior courts in order to ensure that neither political bias nor personal favouritism and animosity play any part in judicial appointment. For example, in the Constitution of Pakistan, 1973, Article 175(A) has been added to by the Constitution (Eighteenth Amendment) Act, 2010, which provides for the new method of appointment of judges of the superior courts involving a Judicial Commission headed by the Chief Justice of Pakistan (two senior judges of the Supreme Court and a retired judge nominated by the Chief Justice constitute a majority in the Commission) and a Parliamentary Committee (comprising of eight members with equal representation of the Government and the Opposition) having only the authority to return the recommendation back to the Judicial Commission only if least six out of eight members favour such an action.²⁸⁶ Similarly, in the UK, the Constitutional Reform Act, 2005, has been passed by the Parliament providing for the establishment of a Judicial Appointments Commission of 15 members headed by a lay person (as Chairman) having the authority to submit its report to the Lord Chancellor selecting one person for each vacancy in high judicial offices (i.e. Lord Chief Justice, other Heads of Division, Lords Justices of Appeal, High Court Judges) 'solely on merit'.²⁸⁷ In order to bring in greater transparency and accountability in judicial appointments, the Government of India introduced first in 1990 in the Lower House of the

²⁸⁵ Article 128, the Constitution of the Co-operative Republic of Guyana, 1980, Article 155, the Constitution of Algeria, 1989, the Constitution of the Republic of Croatia, 1990, Article 82(1), the Constitution of Namibia, 1990, Article 132(2), the Constitution of the Sovereign Democratic Republic of Fiji, 1990, Article 87(1), the Constitution of Nepal, 1990, Article 52, the Constitution of the Kingdom of Saudi Arabia, 1992, Article 174(3), the Constitution of South Africa, 1996, Article 147 and 149, the Constitution of the Federation of Rwanda, 2003, Article 179, the Constitution of Poland, 1997, Article 136(4), the Constitution of Albania, 1998, Article 44(E), the Constitution of the Republic of Iraq, 2005, Article 104(1), the Constitution of the Republic of Trinidad and Tobago, 1976, Article 231(1) and 231(2), the Constitution of the Republic of Nigeria, 1999.

²⁸⁶ Hasan- Askari Rizvi, 'Constitutional Amendment and Judicial Appointments', *The Daily Times*, 16 May 2010.

²⁸⁷ Sections 67-96, the Constitutional Reform Act, 2005

Parliament a Bill, titled the Constitution (Sixty-Seventh Amendment) Bill, 1990, seeking to constitute the National Judicial Commission and to make appointment to the Supreme Court and the High Court on the basis of its recommendation. But the Bill, which proposed introduction of Part XIII A (apart from amending Articles 124, 217, 222, and 231) in the Constitution, lapsed with dissolution of that Lok Sabha (the lower house of the Parliament).²⁸⁸ Again in 2002, the Government introduced the Constitution (98th Amendment) Bill to constitute a National Judicial Commission, by including Chapter IVA in Part V of the Constitution, consisting of the Chief Justice of India [CJI] as its Chairman, two Judges of the Supreme Court next to the CJI in seniority, the Union Minister for Law and Justice, and one eminent citizen to be nominated by the President in consultation with the Prime Minister. Because of the controversies regarding the composition and functions of the Commission, the second Bill also lapsed in 2003.²⁸⁹ Thus it may be suggested that the Federal Constitution of Malaysia be amended providing for the establishment of an independent, effective and meaningful body for vetting and selecting best candidates for the consideration of the Prime Minister excluding the present overlapping process which enables the office bearers of the superior courts, to be the constituent members of the Commission, to have a 'second bite at the cherry', while expressing their personal views about the candidates under the Constitutional selection procedure if they disagreed earlier with Commission's choice.

²⁸⁸ 'National Commission to Review the Working of the [Indian] Constitution', A Consultation Paper on Superior Judiciary, 26 September 2001 <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm> (accessed on 9 February 2010).

²⁸⁹ Rajeev Dhavan, 'The Transfer of Judges,' *The Hindu* (India), 29 October 2004; V. Venkatesan, 'Judiciary: A Flawed Mechanism', (2003) 20(II) *Frontline* (A Magazine Published by the Hindu Group of Publications).

E. Constitutional and Statutory Provisions in Malaysia Concerning the Number of Judges of Superior Courts

The original Federal Constitution of 1957 fixed the maximum number of judges of the then Supreme Court and empowered the Parliament to increase the number of puisne judges: 'The Supreme Court shall consist of a Chief Justice and other judges; but the number of the other judges shall not exceed fifteen until Parliament otherwise provides.'²⁹⁰ In 1963, the Constitution was amended, on the formation of the Federation of Malaysia, which, *inter alia*, provided that the number of judges of the Federal Court (which replaced the Supreme Court), excluding the Lord President and the three High Court Chief Justices (Malaya, Borneo and Singapore) should be four other judges, until the Parliament otherwise provides. But the power of the Parliament to alter the number of judges was abolished on 27 August 1976 and Parliament was replaced with the Yang di-Petuan Agong as the authority to increase the number of judges of the Federal Court.²⁹¹

In 1982, the Yang di-Pertuan Agong by an order increased the number of Federal Court Judges to seven excluding the Chief Justice of the Federal Court, and the two Chief Judges of the High Court in Malaya and the High Court in Borneo.²⁹² When in 1994, the Court of Appeal was established as an intermediate court between the Federal Court (Federal Court was renamed in 1985 as the Supreme Court having its head styled as Lord President and then again redesigned on 24 June 1994 as the Federal Court) and the High Courts, its President was made an ex-officio Judge of the Federal Court thus raising the number of ex-officio judges to four.²⁹³ However, next increase in the number of other Judges of the Federal Court was accomplished by the Yang di-Pertuan Agong in 2005 when the number was increased,

²⁹⁰ Original Article 122(1), the Federal Constitution of Malaya, 1957.

²⁹¹ The Constitution (Amendment) Act, 1976, (Act A 354), P.U.(A) 114/1982.

²⁹² P.U.(A) 114/1982.

²⁹³ The Constitution (Amendment) Act, 1994.

by one, to eight²⁹⁴ (thus the total number stood at $4 + 8 = 12$). In 2009, the number of other judges of the Federal Court has been increased by 3.²⁹⁵ Thus presently the total number of judges of the Federal Court is $(12 + 3 =) 15$ including the Chief Justice of the Federal Court, the President of the Court of Appeal and the two Chief Judges of the High Courts.

Thus it is evident that the Parliament did not ever exercise its power of increasing the number of judges of the highest court of the land for a period of twenty years from 1957-1976. But after conferring this power on the Yang di-Pertuan Agong, the number of judges of the Federal Court has been increased thrice: in 1982, 2005 and 2009. In exercising its constitutional power, the Yang di-Pertuan Agong was required to 'act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet and "where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance such [an] advice."²⁹⁶

E.1. Number of Judges of the Court of Appeal

The Court of Appeal, established in 1994, was to 'consist of a Chairman (to be styled the 'President of the Court of Appeal') and, until the Yang di-Pertua Agong by order otherwise provides, of ten other judges.'²⁹⁷ By virtue of this power, the Yang di-Pertuan Agong increased the number of judges in the Court of Appeal from ten to fifteen in 2001,²⁹⁸ from fifteen to twenty-two in 2006²⁹⁹ and from twenty-two to thirty-two in 2009. Thus the present number of judges of the Court of Appeal is more than three times of the original number (10:32), the increase being executed in a period of nearly eighteen years.

²⁹⁴ P.U.(A) 229/2005.

²⁹⁵ P.U.(A) 163/2009.

²⁹⁶ Article 40(1A), the Federal Constitution of Malaysia.

²⁹⁷ Article 122A, the Federal Constitution of Malaysia.

²⁹⁸ P.U.(A) 378/2001.

²⁹⁹ P.U.(A) 385/2006.

E.2. Number of High Court Judges

The Federal Constitution of Malaysia, 1963 originally specified the maximum and minimum number of judges of the High Courts excluding the Chief Justice. It was provided that each 'of the High Courts shall consist of a Chief Justice and not less than four other judges; but the number of other judges shall not, until Parliament otherwise provides, exceed-

- a) in the High Court in Malaya, twelve [and]
- b) in the High Court in Borneo, eight'

Thus like Article 124 of the Indian Constitution, the Constitution of Malaysia has fixed the number of judges of the High Courts and then empowered the Parliament to vary the number. In exercise of this power, the Federal Parliament in 1969 increased the number of judges of the High Court in Malaya, not of the High Court in Borneo, to 15³⁰⁰ (in place of 12 fixed by the Constitution). But this power of the Parliament was taken away and handed over to the Yang di-Pertuan Agong by a constitutional amendment in August 1976.³⁰¹

The Yang di-Pertuan Agong increased the number of judges of the High Court in Malaya from 15 to 16 in 1977³⁰², from 16 to 20 in 1980³⁰³, from 20 to 27 in 1984³⁰⁴, from 27 to 33 in 1989³⁰⁵, from 33 to 47 in 1994³⁰⁶ (to accommodate the increase in the number of High Courts in the Country) and from 47 to 60 in 2006.³⁰⁷ Thus the present number of judges of the High Court in Malaysia is 60. On the other hand, curiously enough, the number of judges of the High Court in Sabah and Sarawak (since 1994 it is so called) has only been enhanced twice (as against six times done in case of the High Court of Malaya) first in 1994 when the number

³⁰⁰ P.U.(B) 83/1969.

³⁰¹ The Constitution (Amendment) Act, 1976 (Act A354).

³⁰² P.U.(A) 308/1977.

³⁰³ PU(A) 139/1980 (came into force on 1 March 1980) increased the number of judges to 18 and then P.U.(A)

³⁰⁴ 310/1980 (came into force on 1 January 1981) increased the number to 20.

³⁰⁵ P..U.(A) 304/84.

³⁰⁶ P.U.(A) 132/1989.

³⁰⁷ Section 15, the Constitution (Amendment) Act, 1994 (Act A885).

P.U.(A) 384/2006.

of judges was increased from eight to 10³⁰⁸ and then in 2006, from 10 to 13³⁰⁹ by the Yang di-Pertuan Agong. Thus the number of judges of the High Court in Malaya has been increased five times more than its original strength (12:60), but in case of the judges of the High Court in Sabah and Sarawak; original number has not even been doubled (8:13) in 2010.

Therefore, the Yang di-Pertuan Agong's various orders, as gazetted, increasing the number of other judges of the Federal Court from four to 11 between 1976 and 2010, enhancing the number of other judges of the Court of Appeal from 10 to 32 between 1994 and 2010, augmenting the number of judges of the High Court in Malaya from 15 to 60 between 1977 and 2006, and raising the number of judges in the High Court of Sabah and Sarawak from eight to thirteen between 1993 and 2006, do not contain any reasons or justifications whatsoever as to the increase in the total number of judges of the superior courts in Malaysia. It cannot, therefore, be maintained that the decisions to increase the number of judges of the superior courts by the Yang di-Pertuan Agong in accordance with the advice of the Cabinet have always been taken on judicial considerations (e.g. increased number of cases, speedy disposal of cases etc), for accommodating (finding berth on the bench) and rewarding those favourites who have 'delivered' (as law officers, as party men and as judges). Therefore, it may be suggested that, in view of the establishment of the Judicial Appointments Commission in 2009, an amendment should be introduced in the Constitution requiring the Yang di-Pertuan Agong to exercise his power of increasing the number of judges of the superior courts either on the recommendation of the Commission as it is to be found in the

³⁰⁸ Supra note 306.

³⁰⁹ Supra note 307.

Constitution of Namibia, 1990³¹⁰ or upon request of the Superior Court concerned as provided for by the Constitution of the Commonwealth of Puerto Rico, 1952.³¹¹

³¹⁰ Article 79(1) of the Constitution of Namibia provides that 'The Supreme Council shall consist of a Chief Justice and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.' Article 80(1) of the same Constitution states that 'The High Court shall consist of a Judge-President and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.'

³¹¹ Article 3 of the Constitution of the Commonwealth of Puerto Rico, 1952 provides that 'The Supreme Court shall be the court of last resort in Puerto Rico and shall be composed of a Chief Justice and four Associate Justices. The number of Justices may be changed only by law upon request of the Supreme Court.'

Chapter III:

Method of Appointment of the Judges of the Supreme Court Under the Constitution of Bangladesh, 1972 (as Amended from Time to Time by the Civilian and Martial Law Regimes) and the Defunct Supreme Judicial Commission Ordinance, 2008

The following discussion will reveal how the 1972 Constitution of Bangladesh originally conferred on the President the power to appoint the Chief Justice of Bangladesh on the advice of the Prime Minister. By amending the Constitution in 1991 the President has been freed from the obligation of acting in accordance with the advice of the Prime Minister. This analysis will also demonstrate that the convention of appointing the senior most judge of the Appellate Division of the Supreme Court as the Chief Justice, developed in order to ensure that extraneous considerations do not play a part in this pivotal appointment process, has been violated since 2003 on 5 occasions. Additionally, the deliberation will show that the original provision of the 1972 Constitution of Bangladesh concerning appointment of the judges of the Appellate and High Court Divisions of the Supreme Court by the President in consultation with the Chief Justice of Bangladesh was changed by the Constitution (Fourth Amendment) Act, 1975 giving him (the President) the authority to appoint judges only on the advice of the Prime Minister thereby allowing wide scope for the intrusion of politics into the process. But the first Martial Law regime (1975-1979) took an unexpected step to restore the provision concerning consultation into the Constitution in May 1976. But, only within one and a half year, in November 1977, the regime changed its mind to be in line with the immediate previous civilian regime to delete the provision relating to consultation with the Chief Justice from the Constitution. It will further manifest the violations of the convention of appointing the senior most judges of the High Court Division as the judges of the Appellate Division of the Supreme Court by the successive civilian governments and Martial Law regimes on numerous occasions. Finally, this discourse will show how the journey of the

Supreme Judicial Commission, established in 2008 by the third Non-Party Care-taker Government (an interim Government set up for ninety days mainly to assist the Election Commission in conducting the General Elections) by promulgating an Ordinance, to recommend the best candidates to the President for appointment as the judges of the Supreme Court was calculatedly brought to an end by the Awami League Government in February 2009 by not placing the said Ordinance before the first session of the newly constituted Parliament.

A. Appointment of Judges to the Supreme Court of Bangladesh

Part VI, titled 'THE JUDICIARY' having pyramidal structure, of the Constitution of the People's Republic of Bangladesh, 1972 provides for in Chapter I provisions concerning composition, jurisdiction, appointment and removal of judges of the Supreme Court, the highest court of law in Bangladesh. As to the composition of this apex court, the Constitution states that 'There shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division.'³¹² Although under one compendious name of the Supreme Court of Bangladesh there are two divisions of the Court, namely the Appellate Division and the High Court Division, they are erroneously called as two separate and independent courts, the High Court and the Supreme Court. The Supreme Court of Bangladesh is indeed a single Court having two Divisions: the High Court Division of the Supreme Court and the Appellate Division of the Supreme Court. Similar structure of the highest court is also to be found in the Constitution of the Republic of Guyana, 1980³¹³ and the Constitution of Barbados, 1966.³¹⁴

³¹² Article 9(1), The Constitution of the People's Republic of Bangladesh, 1972.

³¹³ Article 123, The Constitution of the Republic of Guyana, 1980 provides that 'the Supreme Court of Judicature shall consist of a Court of Appeal and a High Court.'

³¹⁴ Article 80(1), The Constitution of Barbados, 1966 states that the Supreme Court of Judicature of Barbados is composed of a High Court and a Court of Appeal.

The Constitution of Bangladesh contains provisions relating to the appointment of the Chief Justice, Judges of the Appellate Division and additional as well as regular Judges of the High Court Division of the Supreme Court. These provisions shall be examined as to show whether they ensure a proper selection of judges which lies at the heart of all the problems facing the judiciary in Bangladesh.

A.1. The Appointment of the Chief Justice Of Bangladesh

The Chief Justice, designated by the Country's 1972 Constitution as 'the Chief Justice of Bangladesh',³¹⁵ is the head of the Bangladeshi Judiciary and paterfamilias of the judicial fraternity. His office is, therefore, the most dignified and exalted post in the Judiciary of Bangladesh having ranked fourth in the State Order of Precedence.

The Chief Justice, who as the head of the judiciary sits only in the Appellate Division of the Supreme Court,³¹⁶ is the symbol of justice and freedom and, as such, his appointment is of critical importance in the administration of justice for retaining public confidence in the impartiality, credibility and reliability of the highest court of the land- the Supreme Court. The people must be ensured that the Chief Justice is not appointed only for sharing the political and social philosophy of the party in power as it is required to adjudicate the lawfulness of the actions of the executive and that there is a mechanism, independent of the government control, for the appointment of the Chief Justice taking into account the well-defined objective criteria. As to the importance of the selection and appointment of the Chief Justice to ensure the independence of the judiciary, the observations of then Chief Justice of the Pakistan Supreme Court, Saiduzzaman Siddiqui, made in 1994 in *Asad Ali v Federation of Pakistan*³¹⁷ are well deserved to be mentioned:

³¹⁵ Article 94(2), The Constitution of the People's Republic of Bangladesh, 1972.

³¹⁶ Article 94(3), *ibid*.

³¹⁷ PLD 1998 SC 161.

The selection of a person to the high office of the Chief Justice of Pakistan is a pivotal appointment for maintaining the independence of judiciary and for providing a free and unobstructed access to impartial and independent Courts/Tribunals to the ordinary citizens guaranteed under Articles 9 and 25 of the Constitution.³¹⁸

These realities were indeed ignored and disregarded when the Constitution of Bangladesh, 1972 originally provided that: 'The Chief Justice shall be appointed by the President....'³¹⁹ Thus the power to appoint the Chief Justice is an executive power vested in the President who is duty bound to exercise this power under Article 48(3) as a constitutional head 'in accordance with the advice of the Prime Minister.' Later on, in September 1991, the Constitution (Twelfth Amendment) Act, 1991, which was passed on 14 August 1991 and came into force on 18 September on being majority of the votes cast in the referendum in favour of the President's assent, is one of the two Amendment Acts³²⁰ passed by the Parliament unanimously in the same year (an unprecedented event in the history of Bangladesh), freed the President from the obligation of consulting the Prime Minister in appointing the Chief Justice of Bangladesh.³²¹

Before making any comment on the changed method, it would be apposite to touch upon here the manner in which the Chief Justice of the highest court is appointed in different countries of the world. The methods of appointment followed in various jurisdictions can be grouped into four- which are as follows:

³¹⁸ Ibid., at p. 189.

³¹⁹ Article 95(1), The Constitution of the People's Republic of Bangladesh, 1972.

³²⁰ The other Act is the Constitution (Eleventh Amendment) Act, 1991 passed on 14 August 1991.

³²¹ Amended art 48(3) provides that 'In exercise of all his functions, save only that of appointing the Prime Minister pursuant to clause (3) of art 56 and the Chief Justice pursuant to clause 1 of art 95, the President shall act in accordance with the advice of the Prime Minister.'

1. appointment of Chief Justice by the head of the state either unilaterally as in Ireland, Kenya, Sri Lanka and Sudan³²²; or
 - a) on the advice of the Prime Minister as in Malta and Western Samoa, on the advice of the Prime Minister after and/consultation with the leader of the opposition as in Fiji and Trinidad and Tobago, on the advice of the Prime Minister after consulting the Conference of Rulers as in Malaysia, on the advice of the Cabinet as in Greece and Japan; with the consent of the Parliament as in South Korea and Puerto Rico³²³; or
 - b) on obtaining the agreement of the leader of the opposition as in Guyana³²⁴; or
 - c) on the proposal/recommendation of, or in consultation with, an independent selection body such as judicial council/national judicial commission/ judicial

³²² Article 35(1), The Constitution of Ireland, 1937 states: 'The Judges of the Supreme Court shall be appointed by the President.'

Article 61(1), The Constitution of Kenya, 1963 provides that the Chief Justice of the High Court shall be appointed by the President.

Article 107(1), The Constitution of Sri Lanka, 1978 stipulates that the Chief Justice of the Supreme Court shall be appointed by the President.

Article 104(1), The Constitution of Sudan, 1998 states that the President of the Republic shall appoint the Chief Justice.

³²³ Article 98, The Constitution of Malta, 1964 provides that the appointment of the Chief Justice shall be made by the President acting in accordance with the advice of the Prime Minister.

Article 65(2), The Constitution of Western Samoa, 1960 states 'The Chief Justice shall be appointed by the Head of the State; acting on the advice of the Prime Minister.'

Article 132(1), The Constitution of the Sovereign Democratic Republic of Fiji, 1990 stipulates: 'The Chief Justice of the Supreme Court is appointed by the President on the advice of the Prime Minister following consultation by him or her with the Leader of the Opposition.'

Article 102, The Constitution of the Republic of Trinidad and Tobago, 1976 states: 'The Chief Justice shall be appointed by the President after consultation with the Prime Minister and the Leader of the Opposition.'

Article 122B, The Federal Constitution of Malaysia, 1963 provides that the Chief Justice of the Federal Court shall be appointed by the Head of the State acting on the advice of the Prime Minister, after consulting the Conference of Rulers.

Article 91(5), The Constitution of Greece, 1975 states 'Promotion to the office of President of the Supreme Court shall be effected by Presidential decree issued on the proposal of the Cabinet by selecting from among the members of the highest court.'

The Constitution of Japan, 1946 provides that the appointment of the Chief Judge of the Supreme Court shall be made by the Emperor as designated by the Cabinet.

Article 8, The Constitution of the Commonwealth of Puerto Rico, 1952 stipulates that the Chief Justice shall be appointed by the Governor with the advice and consent of the Senate.

Article 104(1), The Constitution of the Republic of South Korea, 1948 states that the Chief Justice of the Supreme Court is appointed by the President with the consent of the National Assembly.

³²⁴ Article 127(1), The Constitution of the Cooperative Republic of Guyana, 1980 states that the Chief Justice of the Supreme Court of Guyana shall be appointed by the President acting after obtaining the agreement of the Leader of the Opposition.

service commission/constitutional council/ high council of justice as in Armenia, Poland, Saudi Arabia, Spain, Namibia, Nepal, Nigeria, in consultation with the judges of superior courts as in India;³²⁵ or

2. appointment by the parliament upon proposal/nomination/recommendation by the head of the states as in Croatia, Ethiopia and Russia;³²⁶ or
3. election of the Chief Justice by the judges of the Supreme Court as in Belgium, Denmark and Ukraine;³²⁷ or

³²⁵ Article 95(3), The Constitution of Armenia, 1995 provides that the President of the Court of Appeals shall be appointed on the proposal of the Judicial Council.

Article 179(3), The Constitution of Poland, 1997 states that the First President of the Supreme Court shall be applied by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.

Article 52, The Constitution of the Kingdom of Saudi Arabia, 1992 stipulates that the appointment of judges (including the Chief Justice) by Royal Decree upon a proposal from the Higher Council of Justice.

Article 123(2), The Constitution of Spain, 1978 provides that the President of the Supreme Court shall be appointed by the King at the proposal of the General Council of the judicial branch.

Article 82(1), The Constitution of the Republic of Namibia, 1990 states that the appointment of Chief Justice of the Supreme Court shall be made by the President on recommendation of the Judicial Service Commission.

Article 87(1), The Constitution of the Kingdom of Nepal, 1990 provides that the Head of the State shall appoint the Chief Justice of Nepal on the recommendation of the Constitutional Council.

Article 231(1), The Constitutional of the Federal Republic of Nigeria, 1999 stipulates that the appointment of a person to the office of Chief Justice of Nigeria shall be made by the President on the recommendation of the National Judicial Council subject to confirmation of such appointment by the Senate.

Article 124(2), The Constitution of India, 1949 provides that every judge of the Supreme Court and of the High Court in appointed by the President after consultation with such judges of the Supreme Court and of the High Court in the States as the President may deem necessary for the purpose.

³²⁶ Article 118, The Constitution of the Republic of Croatia, 1990, provides that the President of the Supreme Court of the Republic of Croatia shall be appointed by the Croatian Parliament at the proposal of the President of the Republic with a prior opinion of the general session of the Supreme Court of the Republic of Croatia and of the authorised committee of the Croatian Parliament.

Article 81(1), The Constitution of the Democratic Republic of Ethiopia, 1994 states that the President and Vice-President of the Federal Supreme Court shall upon recommendation by the Prime Minister be appointed by the House of Peoples' Representatives.

Article 128(1), The Constitution of the Federation of Russia, 1993 stipulates that the judges of the Supreme Court of the Russia Federation shall be appointed by the Federal Council following nomination by the President of the Russian Federation.

Article 21(3), The Constitution of the Kingdom of Bhutan, 2005 provides that the Chief Justice of Bhutan shall be appointed from among the Judges of the Supreme Court or from among eminent jurists in consultation with the National Judicial Commission.

Article 174(3), The Constitution of South Africa, 1996 states that the President, after consulting the Judicial Service Commission, appoint the Chief Justice of the Supreme Court of Appeal.

³²⁷ Article 151(4), The Constitution of Belgium, 1970 provides that the Court of Cassation and the High Courts' choose within themselves their Presidents and Vice-Presidents.

Article 59(2), The Constitution of the Kingdom of Denmark, 1953 stipulates that the High Court of the Realm shall elect a President from among its members.

Article 128, The Constitution of Ukraine, 1996 states that the Chairman of the Supreme Court of Ukraine is elected to office by the Plenary Assembly of the Supreme Court of Ukraine by secret ballot.

4. election of the Chief Justice by the Parliament upon nomination/proposal/recommendation by the head of the state as in Georgia, Hungary, Rwanda and Serbia and Montenegro;³²⁸

Therefore, it is evident that there are four broad modalities prevalent in different jurisdictions for appointing the Chief Justice, of which the method of appointment by the head of the state on the basis of proposal/recommendation of, or in consultation with, an independent judicial/advisory body has been resorted to by a large number of countries followed by the procedure to appoint by the head of the state on the advice of the prime minister/cabinet or on the agreement of the leader of the opposition. Since the Chief Justice symbolizes and epitomises the independence of the judiciary, his appointment cannot be left to the exclusive discretion of the executive thereby paving the way of intruding political consideration into the process and, as such, only a very few countries (e.g. Ireland, Kenya, Sri Lanka and Sudan) have bestowed exclusive power to appoint the head of the judiciary on the President. As a matter of fact, the President of Bangladesh has been given a blank cheque of unfettered discretion to appoint the Chief Justice of Bangladesh ignoring the benefit of the shared responsibility, preferably with a selection committee consisting of majority members from the higher judiciary, to exclude politically motivated appointment for improper motives.

³²⁸ Article 90(2), The Constitution of Georgia, 1995 provides that the President of the Supreme Court of Georgia shall be elected for a period of not less than ten years by the Parliament by the majority of the number of the members of Parliament on the current nominal list upon the submission of the President of Georgia.
Article 48(1), The Constitution of the Republic of Hungary, 1949 states that based on the recommendation made by the President of the Republic, the Parliament shall elect the President of the Supreme Court.
Article 147, The Constitution of the Federal Rwanda, 2003 stipulates that the President of the Supreme Court is elected by the Senate from two candidates in respect of each port proposed by the President of the Republic after consultation with the cabinet and the Supreme Council of the Judiciary.
Article 47, The Constitutional Charter of the State Union of Serbia and Montenegro, 1990 provides that the judges of the Court of Serbia and Montenegro shall be elected by the Assembly of Serbia and Montenegro upon the proposal of the Council of Ministers.

There is no specific qualification (competence) in the Constitution of Bangladesh as to the appointment of the Chief Justice. Therefore, the qualifications laid down in the Constitution for the appointment of judges of the High Court Division and Appellate Division of the Supreme Court are equally applicable in case of appointment of the Chief Justice of Bangladesh. As to the criteria for selecting the Supreme Court Judges, the Constitution originally provides that:

(2) A person shall not be qualified for appointment as a judge unless he is a citizen of Bangladesh and-

- a) has for not less than ten years been an advocate of the Supreme Court; or
- b) has, for not less than ten years, held judicial office or an advocate in the territory of Bangladesh and has, for not less than three years, exercised the power of a District Judge.³²⁹

Thus the Constitution of Bangladesh provides for the appointment of judges to the Supreme Court both from the bench and the bar. Under the original provision, only a citizen of Bangladesh, not a foreigner, could be appointed as a Judge of the Supreme Court provided he fulfilled one of the three qualification requirements, namely,

1. experience as an advocate of the Supreme court for not less than ten years;
2. experience as an advocate in the territory of Bangladesh for not less than ten years and functioning as a district judge for not less than three years; or
3. experience as a judicial officer for not less than ten years and performing the functions of a district judge for not less than three years.

It should be stated that ordinarily an advocate who has practised before subordinate courts in Bangladesh for a period of two years may be enrolled as an advocate of the Supreme

³²⁹ Original Article 95(2), The Constitution of the People's Republic of Bangladesh, 1972.

Court³³⁰ and after practising before the Supreme Court for a period of not less than 10 years he shall be eligible for appointment as a judge of the Supreme Court. In 1977, the provision for appointing an advocate having the experience of practising before the subordinate courts for not less than 10 years and of exercising the powers of a district judge for not less three years, has been dispensed with by an amendment to the Constitution.³³¹ Furthermore, the same amendment deleted from the Constitution the requirement of acting as a district judge for a judicial officer having at least ten years experience for appointing as a judge of the Supreme Court. Therefore, under the existing arrangement of the Constitution, an advocate having 10 years practice before the Supreme Court or a judicial officer having not less than ten years experience shall be qualified for a berth in the apex court of the country.

It is noticeable that the Constitution does not provide for any guidelines as to the academic qualification (e.g. preference should be given to the advocate having LL.M, MPhil or PhD degree) and brilliant result, professional ability, reputation and integrity for the selection of the Supreme Court advocates and judicial officers as the judges of the Supreme Court. Therefore, any Supreme Court advocate having no standing practice (e.g. who only kept his enrolment updated by paying the prescribed fees without going to the Court) or having no experience of handling crucial cases (only moved simple matters like bail or stay petition before the Court) can be appointed as a judge of the Supreme Court. Similarly, the Constitution is also silent as to the criteria- e.g. seniority, disposal of cases, quality of judgment given, maintenance of good relationship with the colleagues and the bar- which should be kept in mind in appointing a judicial officer, having at least ten years experience, as a judge of the Supreme Court. Thus any judge of the subordinate

³³⁰ Article 21(1), Bangladesh Legal Practitioners and Bar Council Order, 1972.

³³¹ Section 2, Second Proclamation (Tenth Amendment) Order 1977 (Second Proclamation Order No 1 of 1977), 27 November 1977.

court, who has served the court for at least ten years, having not been appointed as a district judge (for the appointment of a district judge, a judicial officer requires at least ten years experience including three years experience as a joint district judge or both as a joint district judge and additional district judge³³²) can theoretically be appointed as a judge of the Supreme Court although no one below the rank of the district judge has ever (until December 2010) been appointed as a judge of the Supreme Court.

It is pertinent to mention here that in 1977 clause (c) has been added to Article 95(2) of the Constitution empowering the Parliament to enact law prescribing any other qualification as an alternative to 10 years experience as a Supreme Court advocate or 10 years experience as a judicial officer for appointment as a judge of the Supreme Court.³³³ But no such law prescribing other qualification for the appointment of judges of the Supreme Court has yet (December 2010) been enacted.

However, in the absence of any constitutional provision specifying that the Chief Justice is to be appointed from amongst the judges of the Appellate Division, it can strongly be argued that any advocate of the Supreme Court or judicial officer, having fulfilled the qualifications as laid down in Article 95(2) of the Constitution of Bangladesh for the appointment of judges of the Supreme Court, can directly be appointed as the Chief Justice of Bangladesh.

But, the appointment of the Chief Justice has been left at the pleasure of the President who is not supposed to know the judicial track record of the judges of the Appellate Division (i.e. their performance in handling and conducting cases including cases of constitutional importance), their keen intellect, legal acumen, integrity and reputation. In fact, it is the Ministry of Law, Justice and Parliamentary Affairs which initiates the

³³² Part XXII, Bangladesh Civil Service Recruitment Rules 1981(as amended in 1995).

³³³ The Second Proclamation (Tenth Amendment) Order, 1977.

proposal through the Prime Minister recommending the senior-most judge of the Appellate Division for the appointment as the Chief Justice of Bangladesh whenever vacancy occurs in that office. The President as a rule ordinarily approves the proposal and this convention of appointing the most senior judge of the Appellate Division as the Chief Justice was consistently observed in Bangladesh until June 2003 although there was an abortive attempt made by the then President, H.M. Ershad, in January 1990.

After the retirement of the Chief Justice Badrul Haider Chowdhury on 31 December 1989, the then President H. M. Ershad appointed on 1 January 1990 the senior most Judge of the Appellate Division, Justice Shahabuddin Ahmed, as the Acting Chief Justice, instead of the regular Chief Justice, under Article 97 of the Constitution, which evoked sharp reaction of the Supreme Court Bar Association. The Association demanded the maintenance of the tradition of appointing the senior most Judge of the Appellate Division to the Office of the Chief Justice of Bangladesh. After thirteen days, on 14 January 1990, Justice Shahabuddin Ahmed was appointed as the sixth regular Chief Justice of the country.

A.1.1. Violation of the Convention of Seniority in Appointing Chief Justice of Bangladesh

The convention or tradition of seniority in appointing the senior most Judge of the Appellate Division as the Chief Justice of Bangladesh was violated by the regime of the B.N.P- Jamaat Alliance (2001-2006), the Non-Party Caretaker Government (2006-2008) and the Awami League regime (2009-to date).

A.1.2. Supersession During the Regime of the B.N.P-Jamaat Alliance (2001-2006)

The convention of seniority was first violated on 23 June 2003 by the regime of the B.N.P- Jamaat Alliance when Justice K.M. Hasan, who had been superseded twice by the previous

Awami League Government (1996-2001) first on 9 January 2000 in elevating Justice Rabbani and Justice Ruhul Amin and on 15 May 2001 in elevating Justice Md. Fazlul Karim to the Appellate Division ignoring the recommendation of the Chief Justice, was appointed as the Chief Justice of Bangladesh in supersession of two fellow colleagues, Justice Md. Ruhul Amin and Justice Md. Fazlul Karim, who had earlier been elevated to the Appellate Division superseding their senior judge Justice K.M. Hasan. The four party Alliance Government justified this supersession by terming it as a corrective measure aimed at to provide redress/relief to the earlier injustice perpetrated on Justice K.M. Hasan.

The next violation took place when, after the retirement of Justice K.M. Hasan on 26 January 2004 as the Chief Justice of Bangladesh, Justice J R Mudassir Hussain was appointed as the Chief Justice of Bangladesh on 27 January 2004 in preference to the same two judges- Justice Md. Ruhul Amin and Justice Md. Fazlul Karim, who had also superseded him in getting berth on the Appellate Division.³³⁴ This supersession was also justified in the same vein as it had been done on the previous occasion.

A.1.3. Supersession During the Non-Party Care-taker Government (2007-2008)

During the regime of the Non-Party Care-taker Government (consisting of the Chief Advisor and ten other advisors), which is an interim government established within fifteen days of the dissolution of Parliament that have the mandate to carry on ordinarily the routine functions of the government and is destined to 'give to the Election Commission all possible aid and assistance for holding the general election of members of Parliament peacefully, fairly and impartially'³³⁵, President Professor Dr. Iajuddin Ahmed appointed on 25 May 2008 Justice M.M. Ruhul Amin as the (16th) Chief Justice of the Supreme Court of Bangladesh (on

³³⁴ Asian Human Rights Commission, 'Bangladesh: Culture of Supersession in Supreme Court will Undermine Rule of Law', 26 May 2008.

³³⁵ The Constitution (Thirteenth Amendment) Act, 1996, added Articles 58B, 58C and 58D to the Constitution.

retirement of Chief Justice Mohammad Ruhul Amin) in supersession of the senior most judge of the Appellate Division, Justice Fazlul Karim.

The President of the Supreme Court Bar Association (SCBA) Barrister Shafique Ahmed, expressed his dissatisfaction and disapproval of such an appointment, thus:

Although supersession has also taken place in appointing Chief Justice and Appellate Division Judges during the past governments, the Bar has never accepted such supersession... such supersession has led the people concerned to apprehend political ill-detection of the government.³³⁶

The Association broke its tradition of welcoming the new Chief Justice when it refrained from facilitating Justice M.M. Ruhul Amin on his first appearance in the Court on 1 June as the Chief Justice. It also refrained from giving a traditional farewell felicitation to the outgoing Chief Justice Mohammad Ruhul Amin on 29 May. This abstention from the customary practices of the SCBA of honouring the outgoing and the newly appointed Chief Justice was also held to be a mark of protest against the Appellate Division's recent verdict that barred the highest court from hearing bail petition of any accused under the Emergency Power Rules, 2007.³³⁷

A.1.4. Supersession During the Present Awami League Government (2009-todate)

Within a period of two years, the present Awami League Government has violated the principle of seniority in appointing the Chief Justice on two occasions, first in December 2009 and then in September 2010. President Zillur Rahman appointed Justice Md. Tafazzul Islam, who headed the five member special bench of the Appellate Division of the Supreme Court that pronounced on 19 November 2009 the 'landmark verdict in *Bangabandhu Sheikh*

³³⁶ Asian Human Rights Commission, supra note 333.

³³⁷ Ibid; Staff Correspondent, 'New CJ takes oath', *The Daily Star* (Dhaka), 2 June 2008, 1.

Mujibur Rahman (father of the present Prime Minister) assassination case 'mainly retaining the High Court's decision³³⁸, as the Chief Justice of Bangladesh in supersession of the senior most judge of the Appellate Division Justice Mohammad Fazlul Karim³³⁹ (thus Justice Karim became the victim of supersession for the fourth time). It is ironical that the then President of the Supreme Court Bar Association who in May 2008 criticised and disapproved the appointment of M.M. Ruhul Amin as the Chief Justice of Bangladesh, made during the regime of the Non-Party Care-taker Government in supersession of the senior most judge of the Appellate Division Mohammad Fazlul Karim, has now a complete change of heart (as Minister for Law, Justice and Parliamentary Affairs of the present regime) in proposing Justice Tafazzul Islam, ignoring the same senior Justice Mohammad Fazlul Karim, to appoint as the Chief Justice of Bangladesh. The President again violated the principle of seniority on 26 September 2010 when he appointed Justice A.B.M Khairul Haque (replacing Justice Fazlul Karim) as the nineteenth Chief Justice of the country ahead of his two senior colleagues in the Appellate Division.³⁴⁰

Because of his appointment as an additional and regular judge of the High Court Division in 1998 and 2000 respectively by the then Awami League Government, his elevation to the Appellate Division in July 2009 by the present Awami League regime, upholding a lower court's verdict sentencing 15 killers of Bangabandhu Sheikh Mujibur Rahman and his family, his judgment as a judge of the High Court Division declaring the Constitution (Fifth Amendment) Act, 1979, passed to ratify and confirm all the actions of the first Martial Law Regime (1975-1979), unconstitutional³⁴¹, Chief Justice Khairul Haque's appointment has been stigmatized and branded by the legal and political circles as a politically motivated

³³⁸ Staff Correspondent, 'Tafazzul new chief justice', *The Daily Star* (Dhaka), 16 December 2009, 1.

³³⁹ Staff Correspondent, 'Outgoing CJ slated at farewell', *The Daily Star* (Dhaka), 30 September 2010, 1.

³⁴⁰ Staff Correspondent, 'Justice Khairul Haque new chief justice', *The Daily Star* (Dhaka), 27 September 2010, 1.

³⁴¹ Ibid.

appointment in which considerations of sharing ideological views has mainly intruded into the choice. However, the present President and the Secretary-General of the Supreme Court Bar Association maintained the Association's tradition of protesting (and criticising) the supersession of the two judges (who considered it dignified to go on leave) senior to the newly appointed Chief Justice terming the 'appointment as politically motivated' and had the effect of tarnishing 'the image of the apex court.'³⁴²

Furthermore, it is believed that appointing a judge, ranked third in the seniority list, as the Chief Justice, the Government might have two hidden agendas, namely, immediate and ultimate. The immediate plan was to get oath administered to the newly appointed (appointed in April 2010) two additional judges, of which one was accused in a murder case while other allegedly kicked on the door of the Chief Justice's room in November 2006, by the present Chief Justice as his predecessor (Chief Justice Fazlul Karim) had declined to do so citing 'unavoidable reasons.' Its immediate plan has, in the meantime, been executed by the new Chief Justice A.B.M Khairul Haque who administered oath in November 2010 to the aforesaid judges, to use his words for discharging 'constitutional obligation.' The eventual and terminal plan is to secure the appointment of the new Chief Justice as the Chief Advisor of the next Non-Party Care-taker Government (for being retired last).

Thus it appears that the consideration of political allegiance has played a dominant factor, in fact main factor, instead of seniority, in appointing the Chief Justice since 1996 when the Constitution (Thirteenth Amendment) Act, 1996 made the provision of heading the Non-Party Care-taker Government by the immediate past Chief Justice to be constituted after the dissolution of Parliament (within 15 days) for ensuring free, fair and credible General Elections. It is not kept in mind that the violation of the principle of seniority in appointing

³⁴² M. Abdul Latif Mondal, 'Averting controversy in appointment of Chief Justice', *The Daily Star* (Online), 10 October 2010 <http://www.thedailystar.net/newDesign/news-details.php?nid=157772> (accessed on 15 November 2010).

Chief Justice not only causes injustice to the superseded judges by shattering and crashing their legitimate expectation of becoming Chief Justice but also makes room for further injustice likely to be meted out in future against the litigants, particularly in cases where the government is a party. This has also the disastrous impact of making the highly dignified and prestigious office of the Chief Justice controversial and of lowering public faith, confidence and trust in the impartiality of the highest court of the land. No one can calculate the aggregate amount of evil inflicted on the community by such a bad decision of supersession. Furthermore, if the superseded judges in protest resign or take leave until retirement, the country will be deprived of the service of the senior, experienced and competent judges. It can hardly be expected, especially in the third world countries, that the junior judge appointed as the Chief Justice overlooking the claim of his senior colleagues, will refuse to accept such an appointment or even accepted will resign later on, to save the apex court from political clout and controversy.

A.1.5. Justification for Observing the Convention of Seniority in Appointing the Chief Justice Of Bangladesh

Although Article 95 of the Bangladesh Constitution does not provide that the senior most judge of the Supreme Court shall be appointed as the Chief Justice of Bangladesh, a convention of appointing senior most judge of the Supreme Court as the Chief Justice, as mentioned earlier, has developed which must consistently be followed as an inflexible and mechanical rule. Although it is quite possible that in a given case, the senior most judge might not be the most suitable choice or might not come up to the highest standard expecting of him and, as such, the inflexible rule of seniority can lower judicial performance, yet the rule of seniority must be adhered to in appointing the Chief Justice for the following reasons:

In the first place, there is a greater safety in appointing invariably the senior most judge as the Chief Justice, the *sentinel qui vive*/ watchdog of the independence of the judiciary, as the President would be unable to pick and choose among the judges on the basis of extraneous considerations, e.g. political or personal favouritism.

Secondly, the senior most judge of the Supreme Court has a legitimate expectancy to be considered as the Chief Justice and, as such, in the absence of his sickness or unwillingness to accept the office of Chief Justice, he is entitled to be appointed as the Chief Justice of Bangladesh. This legitimate expectation of the most senior judge to be appointed as the Chief Justice because of the established convention/practice has been recognised by Chief Justice Sajjad Ali Shah of the Pakistan Supreme Court in *Al-Jihad Trust v Federation of Pakistan*³⁴³.

Thirdly, the supersession of the senior most judge in appointing the Chief Justice of Bangladesh will hurt his sentiment, ego and self-respect and, as such, he may find it difficult to accept the appointed Chief Justice's leadership in good grace. As a result, he may take retirement or take leave until retirement and thereby creating a vacuum of experienced and competent judge in the Appellate Division of the Supreme Court.

Fourthly, the appointment of the Chief Justice by seniority, as mentioned earlier, will prevent a scramble among judges of the Supreme Court for the highest office- the competition to show who has better imbibed the gospel of the ruling party as to catch the eye and ear of the appointing authority whenever a vacancy arises. Even the junior most judge may think that, by giving decision in favour of the executive in a case and by cultivating good relation with it, he will stand a good chance to become the Chief Justice of Bangladesh which will invariably ruin the highest institution of justice and shatter public confidence in it.

³⁴³ PLD 1996 SC 324, at p. 365.

Fifthly, it should be mentioned here that the Constitution of Bangladesh provides for the appointment of regular Chief Justice and acting Chief Justice. Article 95 of the Bangladesh Constitution stipulates for the regular appointment of the Chief Justice, while Article 97 speaks of the appointment of an Acting Chief Justice as a stop-gap arrangement for a shorter period. Unlike the Constitution of India, which in Article 126 has empowered the President to appoint any judge of the Supreme Court irrespective of seniority in cases when the office of the Chief Justice of India is vacant or when the Chief Justice is unable to perform his duties by reason of absence or otherwise, the Constitution of Bangladesh in Article 97³⁴⁴ unequivocally provides for following the mechanical rule of seniority (mandatorily) by the President in appointing the acting Chief Justice of Bangladesh (in cases of vacancy in the office of the Chief Justice or because of absence and illness of the Chief Justice if he is unable to perform his functions). It seems that the expression 'If the office of the Chief Justice becomes vacant' does not refer to the vacancy which occurs on account of the normal retirement of the incumbent Chief Justice, rather it refers only to the vacancy caused by sudden death, resignation or any other unforeseen reasons.

Therefore, since in case of an unexpected vacancy, the Constitution of Bangladesh provides for the appointment of an Acting Chief Justice by the President entirely on the basis of seniority denying him the power to pick and choose from amongst the judges of the Appellate Division and, thereby negating the possibility of patronage appointment, it can strongly be argued that similar approach is to be taken either by following without deviation whatsoever the conventional rule of seniority or by introducing an amendment to Article 95 of the Constitution to the effect that the President shall appoint only the senior most judges of the

³⁴⁴ Article 97, The Constitution of the People's Republic of Bangladesh, 1972 states that 'If the office of the Chief Justice becomes vacant, or if the President is satisfied that the Chief Justice is, on account of absence, illness, or any other cause, unable to perform the functions of his office, those functions shall, until some other person has entered upon that office, or until the Chief Justice has resumed his duties, as the case may be, be performed by the next most senior judge of the Appellate Division.'

Appellate Division of the Supreme Court as the Chief Justice of Bangladesh. In this context, the recommendation of the Arrears Committee (consisting of three Chief Justices of the High Courts [of Kerala, Kolkata and Madras] appointed by the Government of India in 1989 to examine large arrears in the High Courts and to suggest remedies, made in its Report would be of much relevance to quote: 'The Committee, therefore, recommends that the second proviso to Article 124(2) be deleted and an appropriate proviso be substituted to the effect that the senior most Judge of the Supreme Court shall ordinarily be appointed as the Chief Justice of India.'³⁴⁵

A.2. Appointment of Judges of The Appellate Division of the Supreme Court

The Appellate Division is the higher Division of the Supreme Court (High Court being the lower Division) which hears and determines appeals against judgment, decrees, orders and sentences of the High Court Division.³⁴⁶ The judges (along with the Chief Justice) appointed to the Appellate Division, the maximum number of which has neither been determined by the Constitution nor has Parliament been empowered to fix the number of judges, sit only in that Division.³⁴⁷ It is the President of the Country who has been invested with the power of ascertaining the strength of the judges of the Supreme Court on the advice of the Prime Minister.³⁴⁸ Accordingly, the number of judges to be appointed in the Appellate Division was initially fixed at five, which was later in 2002 enhanced to 7 by the President during the regime of the Bangladesh Nationalist Party (2001-2006). Finally on 9 July 2009, the present President Zillur Rahman increased the number of posts of judges in the Appellate Division of

³⁴⁵ Arrears Committee, constituted by the Government of India, *The Report* (1989), para 7.20.

³⁴⁶ Article 103(1), The Constitution of the People's Republic of Bangladesh, 1972. The Appellate Division does not have any original jurisdiction except the power subject to law to make an order for the investigation of or punishment for any contempt of itself.

³⁴⁷ Article 94(3), *ibid.*

³⁴⁸ Articles 94(2) and 48(3), *ibid.*

the Supreme Court from seven to 11 as per Article 94(2) of the Constitution of Bangladesh.³⁴⁹ The official handout did not specify the reasons (e.g. increased number of cases, speedy disposal of backlog of cases) for increasing the number of judges in the higher division of the Apex Court. There is neither any provision in the Constitution of Bangladesh nor any Constitutional convention requiring the President to consult the Chief Justice of Bangladesh who is the most competent and well-equipped person to articulate his objective opinion after discussing the matter with the senior colleagues and after taking into account the number of cases pending before the Appellate Division. Therefore, in order to prevent the practice of packing of the Appellate Division with the judges having similar political allegiance and ideological outlook after increasing the number of judges in accordance with executives' subjective satisfaction, an amendment should be introduced in Article 94(2) of the Constitution of Bangladesh requiring the President to exercise his power of increasing the number of judges either upon a request of the Supreme Court as provided for by the Constitution of the Commonwealth of Puerto Rico, 1952³⁵⁰ or on the recommendation of the Supreme Judicial Commission as it is to be found on the Constitution of Namibia, 1990.³⁵¹

With regard to the appointment of the judges of the Supreme Court, the 1972 Constitution of Bangladesh originally provided that 'The judges [of the Supreme Court] shall be appointed by the President after consultation with the Chief Justice.'³⁵²

Thus under this method of appointment, which is equally applicable to the appointment of judges of both the Appellate and High Court Divisions of the Supreme Court, the President

³⁴⁹ Staff Correspondent, 'SC Appellate Division gets 4 more judges', *The Daily Star* (online), 15 July 2009, <http://www.thedailystar.net/newDesign/news-details.php?nid=96998> (accessed on 15 November 2010).

³⁵⁰ Article 3, The Constitution of the Commonwealth of Puerto Rico, 1952 provides that 'The number of Justices [of the Supreme Court] may be changed only by law upon request of the Supreme Court.'

³⁵¹ Article 79(1), The Constitution of Namibia, 1990 provides that 'The Supreme Court shall consist of Such additional judges as the President acting on the recommendation of the Judicial Service Commission may determine.'

³⁵² Article 95(1), The Constitution of the People's Republic of Bangladesh, 1972.

was required to exercise his power in accordance with the advice of the Prime Minister.³⁵³ This is essentially the British method of appointing judges of higher judiciary prevalent until the enactment of the Constitutional Reforms Act, 2005 when the Crown used to appoint the judges by convention on the advice of the Prime Minister after consulting the Lord Chancellor³⁵⁴ as the head of the judiciary (i.e. Lord Chancellor used to sit as the Chief Justice in the Judicial Committee of the House of Lords). In the Subcontinent, it is the Indian Constitution, 1949 which for the first time provides for the consultation by the President with the Chief Justice along with 'such of the Judges of the Supreme Court and of the High Court in the States as the President may deem necessary'³⁵⁵ in appointing judges of the Supreme Court. The 1956 and 1962 Constitutions of Pakistan adopted the Indian method by providing for the appointment of judges of the Supreme Court by the President after consultation with the Chief Justice with the modification that he is not required to consult such of the judges of the Supreme Court and of the High Courts in the States in his discretion.³⁵⁶

This method of appointing judges of the Supreme Court in consultation with the Chief Justice, as incorporated originally into the Constitution of Bangladesh, was in accordance with the suggestion of the International Congress of Jurists, held in New Delhi in January

³⁵³ Article 48(3), *ibid*.

³⁵⁴ O. Hood Phillips', *Constitutional and Administrative Law* (Sweet & Maxwell, 1987) at pp. 380-1.

³⁵⁵ Article 124(2), The Indian Constitution, 1949 which provides 'Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.'

³⁵⁶ As Article 149(1), the Constitution of Pakistan, 1956 provided that the Chief Justice of Pakistan shall be appointed by the President and the other judges of the Supreme Court shall be appointed after consultation with the Chief Justice. Article 50 (1), The Constitution of Pakistan, 1962 which in fact reproduced in it the provisions of the Article 149(1) of the 1956 Constitution regarding the appointment of judges of the Supreme Court, provided that 'The Chief Justice of the Supreme Court shall be appointed by the President, and the other Judges shall be appointed by the President after consultation with the Chief Justice.'

1959 that, whatever, body actually makes judicial appointment, it is desirable that the Judiciary should itself cooperate or at least be consulted.³⁵⁷

Since the President (as a layman) can have no knowledge about the legal acumen, legal expertise, independence and firmness, ability to handle cases, personal conduct of advocates or subordinate judicial officers, the requirement of consulting the Chief Justice, having expert knowledge about the ability, competency and suitability of an advocate or a judicial officers for judgeship, was provided for to ensure the selection of the most appropriate person for appointment. Apart from fulfilling the general qualification requirements as laid down in Article 95(2) of the Constitution, e.g. citizenship of Bangladesh and either experience as an advocate of the Supreme Court for not less than 10 years or experience as a judicial officer for not less than 10 years as mentioned earlier, there is no other pre-requisite provided for either by the Constitution or by any other law. Therefore, theoretically it is possible that any advocate or any judicial officer, who fulfils the prescribed Constitutional requisites, can directly be appointed as a judge of the Appellate Division without being a judge of the High Court Division. But in practice, no such an advocate or a judicial officer, except High Court Division Judges, has yet been appointed directly as a judge of the Appellate Division of the Supreme Court. Of course, Bangladesh, as a former province of Pakistan, first under the name of East Bengal and then of East Pakistan (August 1947- March 1971), witnessed the direct appointment of two jurists of outstanding calibre, Manzoor Qadir and Tufail Ali Abdur Rahman, as the Chief Justice of West Pakistan High Court during the regime of President Ayub Khan (1958-1969) and as the Chief Justice of the then High Court of Sind and Balochistan (restored this original spelling by the Constitution (Eighteenth Amendment) Act, 2010) in 1972 respectively.³⁵⁸

³⁵⁷ International Congress of Jurists, Committee of Committee IV, *The Report* (New Delhi, 1959) Article II.
³⁵⁸ PLD 1996 SC 324, at pp. 494-5.

However, a convention has been developed to provide flesh to cloth the dry bone of the Constitution to the effect that the appointment of judges to the Appellate Division of the Supreme Court shall be made from amongst the judges of the High Court Division on the basis of seniority and, as such, the meaning and nature of the pivotal word 'consultation' used in the appointment process shall be examined in discussing the appointment of the judges of the High Court Division of the apex court with special reference to the relevant leading decisions of the Indian, Pakistani and Bangladeshi Supreme Courts.

A.2.1. Deleting the Constitutional Provision Regarding Consultation by the Constitution (Fourth Amendment) Act, 1975

The Constitution (Fourth Amendment) Act, 1975, which was passed by the Parliament about two years and two months of coming into effect of the Constitution during the first elected Government of the Awami League (1973-1975), is an extreme amendment that changed the fundamental character of the Constitution. For, it, *inter alia*, replaced parliamentary democracy with a presidential form of government³⁵⁹ on American pattern without its checks and balances, concentrating virtually all the powers in the hands of the President including the power to remove the judges of the Supreme Court at his pleasure³⁶⁰, to withhold assent to a bill passed by the Parliament³⁶¹ and to declare Bangladesh as a one-party State³⁶² (in fact, Bangladesh was declared as a one-party State on 25 February 1975). Prime Minister Sheikh Mujibur Rahman, who was proclaimed by the Constitution (Fourth Amendment) Act as the President of Bangladesh for a five year term (24 January 1975- 24 January 1980)³⁶³, described this adroit political manoeuvre as the 'second revolution', the 'historic struggle for national liberation'/'the war for national independence' of (March- December) 1971 being

³⁵⁹ Article 4, The Constitution (Fourth Amendment) Act, 1975.

³⁶⁰ Article 15 (i.e. amended Article 96 of the Constitution), *ibid.*

³⁶¹ Article 12 (i.e. amended Article 80 of the Constitution), *ibid.*

³⁶² Article 23 (newly added art 117A of the Constitution), *ibid.*

³⁶³ Article 35, *ibid.*

the first revolution. However, the Constitution (Fourth Amendment) Act, provided that 'The judges [of the Supreme Court] shall be appointed by the President.'

Thus the President's obligation to consult the Chief Justice in appointing puisne judges of the Supreme Court was dispensed with. The abolition of Constitutional requirement of consultation with the Chief Justice extended the door too wide-open for the appointment of judges by the President on extraneous considerations such as broad sympathy with the social and ideological outlook of the party in power or rewarding someone by giving a place on the bench for rendering service in the past. For the President, who could not be expected to have the knowledge about the candidate's legal acumen and suitability for appointment to the high judicial office being influenced and persuaded would likely to measure fitness of a candidate in terms of political affiliation and allegiance rather than judicial quality. This would result in appointing spineless, obedient and manageable judges which is quite the opposite and antithesis of an independent and courageous judiciary as enshrined in the Constitution of Bangladesh as a fundamental characteristic to the effect: 'Subject to the provisions of this Constitution the Chief Justice and the other judges shall be independent in the exercise of their judicial functions.'³⁶⁴ This led Justice Md. Joynal Abedin to observe in 2009 in *Bangladesh and Justice Syed Md. Dastagir Hossain and others v Md. Idrisur Rahman*³⁶⁵:

Since the fourth amendment of the Constitution, amongst others, affected one of the basic structures of the Constitution by destroying the independence of judiciary by eliminating the process of consultation in the matter of appointment of Judges in the superior Judiciary it is considered as invalid but for some unavoidable reason it could not have been set aside.³⁶⁶

³⁶⁴ Article 94(4), The Constitution of the People's Republic of Bangladesh, 1972.
³⁶⁵ 38 CLC (AD) 2009< <http://www.clcbd.org/judgments/19-constitutional-law/3431-bangladesh-and-justice-syed-md-dastagir-hossain-and-ors-vs-md-idrisur-rahman-2009-38-clc-ad-.html>>.
³⁶⁶ Ibid., at para 64.

'Unavoidable reason', as mentioned in above observations may imply that this Amendment has never been challenged before the Supreme Court as most of the changes introduced by the Constitution (Fourth Amendment) Act were dispensed with by the first Martial Law Regime (1975-1979).

4.2.2. Restoration of Constitutional Provision Concerning Consultation And Deletion Again by the First Martial Law Regime (1975-1979)

For the first time in the history of Bangladesh, Martial Law was declared on 15 August 1975, immediately after the assassination of the President of the Country, Sheikh Mujibur Rahman. It was declared at a time when the country had already been in a State Emergency imposed on 28 December 1974. It seems that Martial Law was proclaimed as a precautionary measure as emergency powers were not considered enough to obviate any public resistance and meet a possible threat to the newly established regime. The authorities on Constitutional Law in the United Kingdom do not deal with this kind of Martial Law declared by the leaders of a *coup d'état* after the overthrow of a legitimate civilian regime by force.³⁶⁷ 'This kind of Martial Law' observed Justice Murshed of the East Pakistan High Court in 1963, with reference to the imposition of Martial Law in Pakistan in 1958, in *Lt. Col. G. L. Bhattacharya v State*³⁶⁸, 'constitutes a class apart and has nothing to do with "Constitutional" Martial Law.'³⁶⁹ In Constitutional Law, Martial Law, which is the great law of social defence, finds justification in the doctrine of necessity for its promulgation in times of grave emergency, when society is disordered by civil war, insurrection or invasion by a foreign enemy, for the speedy restoration of peace and tranquillity, public order and safety in which the civil authority may

³⁶⁷ M. Ershadul Bari, *Martial Law in Bangladesh, 1975-1979: A Legal Analysis* (PhD Thesis, SOAS, University of London, 1985) at pp. 150-1.

³⁶⁸ 13 PLR (Dacca Series) 377.

³⁶⁹ *Ibid.*, at pp. 420-1.

function and flourish.³⁷⁰ Since Martial Law was proclaimed in Bangladesh in peace time and there was no question of suppressing riot, rebellion or insurrection, the declaration of Martial Law on 15 August 1975 did not satisfy the test of the common law doctrine of necessity.³⁷¹ It was to be seen as an extra-constitutional act since throughout the text of the 1972 Constitution of Bangladesh no reference whatsoever has been made to Martial Law.³⁷² Unlike the 1956 and 1962 Constitutions of Pakistan, which had been abrogated after Proclamation of Martial Law in 1958 and 1969 respectively, the 1972 Constitution of Bangladesh was not abrogated by the 1975 Martial Law administration. Neither was it suspended at any time during the Martial Law period. But it ceased to exist as the Supreme Law of the Country as it was made subject to the First Proclamation (issued on 20 August 1975), and Martial Law Regulations or Orders issued by the Martial Law regime from time to time and, as such, the Constitution assumed a subordinate status.³⁷³ Although under the 1972 Constitution of Bangladesh only the Parliament did have the power to amend it and the President was not given any authority to make and promulgate any ordinance for altering or suspending any provision of the Constitution, the President assumed on 19 September 1975 the power of making orders on any subject in, or provided by the 1972 Constitution through the promulgation of the Proclamation (First Amendment) Order, 1975 (Proclamation Order No I of 1975). Accordingly, he amended the Constitution from time to time by issuing Proclamations (Amendments) Orders.

Thus President A.M. Sayem, a former Chief Justice of Bangladesh (1972-1975) who had replaced Khandaker Mostaque Ahmed (the first President under Martial Law who had retained the structure of civilian administration) as the President on 6 November 1975 and Chief Martial Law Administrator (who perhaps was the first Chief Justice to assume the

³⁷⁰ Bari, *supra* note 367, at pp. 423-4.

³⁷¹ *Ibid.*, p. 428.

³⁷² *Ibid.*, p. 429.

³⁷³ *Ibid.*, p. 153.

powers of the Chief Martial Law Administrator in the history of Martial Law administration) on 8 November 1975³⁷⁴, issued the Second Proclamation (Seventh Amendment) Order, 1976 on 28 May 1976 which provided that 'The judges shall be appointed by the President after consultation with the Chief Justice.'³⁷⁵

Thus the constitutional provision of consultation with the Chief Justice by the President in appointing judges to the Supreme Court, removed by the civilian regime of Awami League, was restored by the Martial Law Administration. But the stipulation of consulting the Chief Justice in appointing the judges of the Supreme Court by the President was destined to remain in force only for one year and six months. President and Chief Martial Law Administrator Ziaur Rahman, who had replaced Abu Sadat Mohammad Sayem as the Chief Martial Law Administrator on 29 November 1976 and the President on 21 April 1977, issued on 27 November 1977 the Second Proclamation (Tenth Amendment) Order, 1977 which restored the method of appointment as had been introduced by the Constitution (Fourth Amendment) Act, 1975. As it provided that the 'The judges [of the Supreme Court] shall be appointed by the President.'³⁷⁶ This provision contained in Article 95(1) is still (2010) in the Constitution in view of ratification, confirmation and validation by the Constitution (Fifth Amendment) Act, passed by the Parliament on 6 April 1979.

Thus the President has again been freed from the Constitutional obligation of consulting the Chief Justice, who was in the best possible position to assess the probable fitness of the men likely to prove successful on the bench, in appointing judges of the Supreme Court. Since the President cannot be expected to intimately know the members of the bar and the bench and, as such, may be moved by political considerations, it appears that the President's existing

³⁷⁴ Ibid., at p. 135.

³⁷⁵ Article 4, The Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No IV of 1976).

³⁷⁶ Article 2, The Second Proclamation (10th Amendment) Order, 1977 (Second Proclamation Order No I of 1977).

power of appointment, is not circumscribed with safeguards to ensure that appointments of judges will be made only with the need of the offices in view.

Although the provision for consultation with the Chief Justice, restored in Article 95 of the Constitution of Bangladesh in 1976, was again deleted in 1977 by the Martial Law regime and the deletion was ratified, confirmed and validated by the Constitution (Fifth Amendment) Act, 1979, Justice A.B.M Khairul Huque (as he then was) in August 2005 in *Bangladesh Italian Marble Works Limited v Government of Bangladesh and others*,³⁷⁷ while declaring the Constitution (Fifth Amendment) Act, 1979 *ultra vires* to the Constitution, condoned and validated Article 95 as amended incorporating into it the provision regarding consultation with the Chief Justice by the Second Proclamation (Seventh Amendment) Order, 1976 which had not been in force when the said Fifth Amendment was passed. As he observed:

we do not condone the amendment of clause (1) of Article 95 by the Second Proclamation (Tenth Amendment) Order, 1977 which would amount to revival of Article 95(1) as amended by the Second Proclamation (Seventh Amendment) Order, 1976 which commensurate with that of the original Constitution which reads as follows:

“95. Appointments of Supreme Court Judges (1) The Judges shall be appointed by the President after consultation, with the Chief Justice.”³⁷⁸

On appeal, in 2010 in *Khondker Delwar Hossain & Others v Bangladesh Italian Marble Works Limited*³⁷⁹ the Chief Justice of Bangladesh, Justice Md. Tafazzul Islam rightly observed that the repealed provision of the Second Proclamation (Seventh Amendment) Order 1976 concerning consultation with the Chief Justice by the President cannot legally be

³⁷⁷ 34 CLC (HCD) 2005 < <http://clecbd.org/judgments/19-constitutional-law/3536-fifth-amendment-to-the-constitution-of-bangladesh-judgment-2005-34-clc-hcd.html> >.

³⁷⁸ Ibid., at p. 383.

³⁷⁹ The case has not yet been published in the annual Dhaka Law Reports (DLR), which publishes judgments of the superior courts, namely, the High Court Division and the Appellate Division of the Supreme Court of Bangladesh. However, the Judgment is available at bdnews24.com (Bangladesh's first Online Newspaper) < <http://bdnews24.com/image/5th%20Amendment.pdf> > (accessed on 10 December 2010).

retained and validated by the High Court Division. As he held that the appointment of judges by the President after consultation with the Chief Justice

as provided by Second Proclamation (Seventh Amendment Order 1977) was deleted by the Second Proclamation (Tenth Amendment) Order, 1977. Accordingly, after the amendment of the amended Article 95 by the Second Proclamation (Tenth Amendment) Order, 1977, Article 95 as amended by the Second Proclamation Order No. IV of 1976, did no longer exist, and therefore, it was not ratified or validated or confirmed by the Fifth Amendment. Accordingly this Article 95 as amended by the Second Proclamation Order No. IV of 1976 could not be legally [sic] condoned by the High Court Division as it was not in force on the day the Fifth Amendment was passed. More so, a repealed provision cannot be legally [sic] retained and/or validated by the Court. So Article 95 will remain as it existed on August 15, 1975.³⁸⁰

However, although the President and Chief Martial Law Administrator after restoring the provision regarding consultation with the Chief Justice for one and half year (28 May 1976-26 November 1977) again abolished it by the Second Proclamation (Tenth Amendment) Order from 27 November 1977, then Chief Justice of Bangladesh, Justice Kemal Uddin Hossain (February 1978- 11 April 1982), made it public in 1986 in Justice Ibrahim Memorial Lecture that he (President Ziaur Rahman) had established the convention of consulting the Chief Justice in appointing judges of the Supreme Court.³⁸¹ In an interview with the author, Justice Kemal Uddin Hossain maintained, it was true that his recommendations had not always been accepted by President Ziaur Rahman in appointing judges, but it was equally true that none was appointed as a judge of the Supreme Court by the President without his concurrence.³⁸² It appears that the restoration of Constitutional provision of consulting the

³⁸⁰ *Khondker Delwar Hossain & Others v Bangladesh Italian Marble Works Limited*, 2010, 178-9, available at [bdnews24.com](http://bdnews24.com/image/5th%20Amendment.pdf) (Bangladesh's first Online Newspaper) < <http://bdnews24.com/image/5th%20Amendment.pdf> > (accessed on 10 December 2010).

³⁸¹ Justice Kemal Uddin Hossain, 'Independent Judiciary in Developing Countries' (Speech delivered at the Justice Ibrahim Memorial Lecture Series, University of Dhaka, 1986) at p. 45.

³⁸² Interview with Justice Kemal Uddin Hossain (Dhaka, 30 August 2008).

Chief Justice by President Sayem and the creation of a convention of consultation with the Chief Justice in 1978 after its abolition in 27 November 1977 were unknown to Justice Syed Amirul Islam of the Supreme Court of Bangladesh when he observed in June 2001 in *S.N. Goswami Advocate v Bangladesh*³⁸³ that:

This is not true that there is consistent practice and convention regarding consultation with the Chief Justice in the matter of appointment of Judges of both the Division. It is untrue and a misstatement of fact. It was true up to 1974 and since 1975 when the 4th Amendment came into force the process of consultation was done away [with] and since then until February 1994 no consultation was made with the Chief Justice while making appointment of Judges in both the Divisions after the 4th Amendment of the Constitution the President never consulted the Chief Justice. The Executive on their own appointed the judges.³⁸⁴

But within a period of one year, it seems that Justice Syed Amirul Islam became aware and enlightened about the convention of consulting the Chief Justice by the President in appointing judges, though not about the restoration of consultation with the Chief Justice. As in 2002 he observed in the *State v Chief Editor, Manabjabin & Others*³⁸⁵:

.... but it is, revealed that even after the Fourth Amendment the judges were, appointed in consultation with the Chief Justice of Bangladesh even during the Martial Law Regime though the matter of consultation was not reflected in the notification until February 1994.³⁸⁶

³⁸³ 55 DLR (2003) 392.

³⁸⁴ Ibid., at pp. 344-5.

³⁸⁵ 31 CLC (HCD) (2002), Part 1 & 2 < <http://clcbd.org/judgments/18-criminal-law/3805-state-vs-chief-editor-manabjabin-and-others-2002-31-clc-hcdpart-one.html> > & < <http://clcbd.org/judgments/18-criminal-law/3806-state-vs-chief-editor-manabjabin-and-others-2002-31-clc-hcdpart-two.html> >. The case is also reported in 57 DLR (2005) 359.

³⁸⁶ 31 CLC (HCD) (2002), Part 2, para 222 <http://clcbd.org/judgments/18-criminal-law/3806-state-vs-chief-editor-manabjabin-and-others-2002-31-clc-hcdpart-two.html>.

A.2.3. Method of Appointment of Judges Under the Second Martial Law Regime (1982-1986)

Bangladesh returned to democratic rule on 6 April 1979 at the initiative of President Ziaur Rahman when the Martial Law, which had been declared on 15 August 1975, was withdrawn. But the civilian governments of Bangladesh did not last long. For, the President was assassinated on 30 May 1981 by a handful of members of the armed forces and the elected President Justice Abdus Sattar, who had first succeeded Ziaur Rahman as the acting President under Article 55(1) of the Constitution and then got elected as the President in November 1981 securing a landslide victory, was eased out of power merely four months and four days of his election, on 24 March 1982 in a bloodless coup. This time the armed forces were again back in the saddle under the leadership of the Chief of Army Staff Hussain Mohammad Ershad who placed the entire country under Martial Law and the 1972 Constitution was suspended. This declaration of Martial Law belied the assertion of the then Prime Minister Shah Azizur Rahman made on 2 March 1982 (merely 20 days before the proclamation of Martial Law) in the Parliament that there was no possibility of imposing Martial Law in Bangladesh as 'democracy has found firm roots in the soil of Bangladesh.'³⁸⁷ However, General Ershad did not exactly come riding on horseback as a disinterested non-partisan saviour of the nation as he, only 12 days after the election of Justice Abdus Sattar as President on 27 November 1981 put forward publicly the idea of evolving a mechanism through which the Army could share power with civilian government so that the periodic coup attempts or possibility of any form of army adventurism would come to an end.³⁸⁸ General Ershad was first satisfied with the assumption of the office of the Chief Martial Law Administrator with the absolute power of promulgating Martial Law Orders and Regulations dealing practically with every organ of the Government. Although he himself took up 'the

³⁸⁷ *Asian Recorder*, 26 March 1982- 1 April 1982, 16519 (corrected page 101435).

³⁸⁸ S. Kamaluddin, 'Bangladesh, the Generals are Posed to Take Over as Sattar Says, Changing of the Guard', *Far Eastern Economic Review* (Hong Kong), 19 March 1982, 12; S. Kamaluddin, 'Bangladesh, Ershad's New Order', *Far Eastern Economic Review* (Hong Kong), 20 August 1982, 16.

entire executive and legislative authority,³⁸⁹ eliminating the constitutional process of the separation of powers, he did not assume the office of the President of the Country. Justice A.F.M Ahsanuddin Chowdhury was sworn in as the 9th President of Bangladesh on 27 March 1982 with the degrading and ignominious condition that he could 'not exercise any power or perform any function without the advice and approval of the Chief Martial Law Administrator.'³⁹⁰

The Proclamation of Martial Law, issued on 24 March 1982, which provided that the judges of the Supreme Court including the Chief Justice would continue to function³⁹¹, did not contain any provision whatsoever regarding the appointment of judges of the Supreme Court. But the Proclamation (First Amendment) Order, issued on 11 April 1982, empowered the Chief Martial Law Administrator, not the President of the Country, to appoint the 'Chief Justice and other Judges of the Supreme Court ... from among Advocates of the Supreme Court or Judicial officers.' Although the Chief Martial Law Administrator was given the power of appointing judges of the Supreme Court from amongst advocates of the apex court or judicial officers irrespective of their length of experience in contravention of Constitutional provisions (i.e. at least 10 years standing practise as an advocate of the Supreme Court or at least 10 years experience as a judicial officer)³⁹², no advocate of the Supreme Court or judicial officer having less than ten years experience was ever appointed by the Second Martial Law regime.³⁹³

However, on 11 December 1983, the Chief Marital Law Administrator H.M. Ershad replaced Justice A.F.M. Ahsanuddin Chowdhury as the President of the country allegedly to pave the way for the transition from Martial Law to democracy and, as natural consequence of this

³⁸⁹ The Proclamation (First Amendment) Order I of 1982, 11 April 1982.

³⁹⁰ Article 2(6), *ibid.*

³⁹¹ Clause 9, The Proclamation of Martial Law, 24 March 1982.

³⁹² Article 95(2), The Constitution of the People's Republic of Bangladesh, 1972.

³⁹³ Interview with the then Deputy Secretary, Ministry of Law, Justice and Parliamentary Affairs (1 September 2008).

change, the Chief Martial Law Administrator was substituted by the President as the appointing authority of the judges of the Supreme Court.³⁹⁴ Thus Lt. General Ershad followed the footstep of General Zia-ul-Hoque of Pakistan, who had first assumed the office of the Chief Martial Law Administrator upon seizure of power in July 1977 apparently to demonstrate that he was not power hungry, but later in September 1978 when he felt confident enough, took over as the President of the country.

A.2.4. Violation of the Convention of Seniority in Appointing Judges of the Appellate Division

Since the Constitution of Bangladesh does not contain any explicit provision as to the appointment of judges of the Appellate Division from amongst the judges of the High Court Division, a convention was established not only to appoint the Judges of the Appellate Division from the High Court Division Judges but also to make the appointment on the basis of seniority. The convention of following seniority in appointing judges of the Appellate Division was consistently followed for about four years from 16 December 1972- 12 August 1976. But since 13 August 1976, the convention of seniority has been transgressed at regular intervals by successive governments, whether military or civilian.

A.2.5. Contravention of the Principle of Seniority in Appointing Judges of the Appellate Division by the First Martial Law Regime (August 1975- April 1979)

The convention of the principle of seniority in appointing judges of the Appellate Division of the Supreme Court from the High Court Division was first violated on 13 August 1976 when President and Chief Martial Law Administrator Justice Sayem elevated Justice Debesh Chandra Bhattachari to the Appellate Division superseding the then senior most judge of the High Court Division Justice Ruhul Islam.³⁹⁵ The next civilian regime of the Bangladesh

³⁹⁴ The Proclamation Order No. III of 1983, 11 December 1983.

³⁹⁵ Information collected from the official records of the Supreme Court of Bangladesh; 'List of Superseded Judges', *The Dainik Sangbad* (Dhaka), 14 January 2001, 1.

Nationalist Party first headed by President Ziaur Rahman (6 April 1979- 29 May 1981) and then by President Justice Abdus Sattar (30 May 1981- 23 March 1982), did not violate the principle of seniority.

A.2.6. Violation of the Principle of Seniority in Elevating Judges to the Appellate Division by the Second Martial Law Regime (24 March 1982- November 1986)

After the declaration of Martial Law on 24 March 1982, the convention of seniority was violated on two occasions, in April 1982 and December 1985, in appointing judges to the Appellate Division from the judges of the High Court Division. Lt. General H.M. Ershad as the Chief Martial Law Administrator appointed on 21 April 1982 A.T.M Masud as the judge of the Appellate Division bypassing his senior, Justice Mohsin Ali. Then as the President of Bangladesh, H.M. Ershad on 26 December 1985, elevated Justice M.H. Rahman and Justice A.T.M Afzal to the Appellate Division superseding three senior High Court Division Judges- Justice A.R.M Amirul Islam Chowdhury, Justice Md. Habibur Rahman (CSP) and Justice Abdul Matin Khan Chowdhry.³⁹⁶

A.2.7. Breach of the Principle of Seniority in Appointing Judges of the Appellate Division by the Civilian Regime of H.M. Ershad (1986- 1990)

H.M. Ershad as the civilian President of the country violated the convention of following seniority in appointing Justice Mustafa Kamal, a High Court Division Judge, as the Judge of the Appellate Division ignoring his two senior fellow colleagues- Justice ARM Amirul Islam Chowdhury and Justice Sultan Hossain Khan.³⁹⁷

³⁹⁶ Ibid.

³⁹⁷ Ibid.

A.2.8. Violation of the Principle of Seniority In Elevating Judges to the Appellate Division During the Civilian Regime of the Bangladesh Nationalist Party (B.N.P) (1991-1996)

President Abdur Rahman Biswas of the Bangladesh Nationalist Party (B.N.P) elevated Justice Abdur Rouf to the Appellate Division of the Supreme Court bypassing his senior colleague Justice ARM Amirul Islam Chowdhury. Justice Amirul Islam Chowdhury was again superseded on 8 June 1995 in appointing Justice Ismailuddin Sarkar as the Judge of the Appellate Division of the Supreme Court.³⁹⁸ Thus Justice A.R.M Amirul Islam Chowdhury was ignored on four occasions in elevating various junior judges to the Appellate Division- twice by President H.M. Ershad and twice by President Abdur Rahman Biswas.

A.2.9. Violation of the Convention of Seniority in Appointing Appellate Division Judges During the Awami League Regime (1996-2001)

President Justice Shahabuddin Ahmed, a former Chief Justice of Bangladesh (1 January 1990- 31 January 1995), superseded during the civilian regime of the Awami League two senior judges of the High Court Division- senior most Justice Md. Mozammel Haque and second senior most Justice Kazi Shafiuddin- on three occasions in appointing Justice Mahmudul Amin Chowdhury on 28 June 1999, Justice Kazi Ebadul Haque on 19 January 2000 and Justice Mainur Reza Chowdhury on 28 November 2000 as judges of the Appellate Division of the Supreme Court.³⁹⁹

It seems that both Justice Md. Mozammel Haque and Justice Kazi Shafiuddin were cut down to size for their decisions in certain sensitive cases. In November 2000, Justice Md. Mozammel Hoque held the preventive detention orders of four leaders of the opposition political party, Bangladesh Nationalist Party (BNP) as illegal and ordered the Awami League Government to pay BD Taka four lac (four hundred thousand) as fine to them for

³⁹⁸ Ibid.

³⁹⁹ Ibid.

unnecessarily keeping them in preventive custody.⁴⁰⁰ The same Judge, Justice Mozammel Hoque in the contempt case of the *Maimul Hosein v Sheikh Hasina Wazed*⁴⁰¹ (the Prime Minister of the Country) held that:

We are disposing of three applications for drawing of proceedings of contempt of Court against the Honourable Prime Minister Sheikh Hasina with a note of desire that the Honourable Prime Minister shall be more careful and respectful in making any statement or comment with regard to the Judiciary or the judges or the courts of Bangladesh in future.⁴⁰²

The other judge, Justice Shafiuddin had to pay a heavy price for giving a decision in 1995 in the Case of *Anwar Hossain Khan v Speaker of Bangladesh Sangsad Bhabon and Others*⁴⁰³ in which boycotting of eight sessions of the Parliament by the opposition members (elected from the Awami League) for one hundred and one days from February 1994 to July 1995 was challenged during the regime of the BNP Government (1991-1996). Justice Qazi Shafiuddin gave direction to the aforesaid abstaining members to attend the Parliament in order to perform and discharge their constitutional functions and obligation respectively. He further observed:

We declare that the salary, emoluments, allowances and other benefits so received by the respondents are illegal and unauthorised. The aforesaid illegal and unauthorised receipts of salaries, emoluments and allowances by the absentee members of the Parliament without leave of the Parliament are recoverable by appropriate authority upon the processes of law.⁴⁰⁴

Although, Justice Md. Mozammel Hoque preferred to go on quite retirement on 1 December 2000, Justice Qazi Shafiuddin, who was supposed to retire on 1 November 2001, preferred to resign on 9 November 2000 as a mark of protest against his supersession on three occasions.

⁴⁰⁰ Ibid; *The Dainik Sangram* (Dhaka), 2 November 2000, 1.

⁴⁰¹ 53 DLR (2001) 138.

⁴⁰² Ibid., at p. 142.

⁴⁰³ 47 DLR (1995) 42.

⁴⁰⁴ Ibid at p. 53.

In an interview with one of the national dailies, Justice Shafiuddin claimed that he might have been superseded for his decision given against the Awami League in the *Anwar Hossain's Case* in 1995 terming their boycotting of the sessions of Parliament as illegal.⁴⁰⁵

However, President Justice Shahbuddin Ahmed for the fourth time violated the convention of seniority on 10 January 2001 when he appointed Justice Rabbani in preference to his senior Justice K.M. Hasan and Justice Ruhul Amin bypassing his senior colleague in the High Court Division, Justice J.R. Mudassir, as the judges of the Appellate Division of the Supreme Court by not accepting the then Chief Justice's recommendation that seniority should be respected.

The appointment of two judges from the second and fourth position of the list of recommendation of four judges⁴⁰⁶ 'disregarding time-honoured and established practice' led to an unprecedented protest by mostly the Supreme Court Lawyers belonging to the main opposition political party (Bangladesh Nationalist Party (B.N.P)) and 13 senior lawyers of the Supreme Court. A meeting of senior lawyers and former presidents and secretaries of the Supreme Court Bar Association (SCBA) was held at its office on 10 January 2001 with its President Barrister Moinul Hosein in the Chair to discuss the situation. It was decided in the meeting to form a new forum- Supreme Council of Lawyers- with Barrister Ishtiaqu Ahmed as its Convenor and Dr. Kamal Hossain, Barrister Moinul Hosein, Abdul Malek as well as Dr. M. Zahir as its members to 'unite all lawyers to protect the judiciary from interference and keep its independence.'⁴⁰⁷ It was further agreed that the remaining two judges- Justice K.M. Hasan and Justice Syed Modassir- of the 'list of senior judges' submitted by the Chief Justice be appointed to the Appellate Division of the Supreme Court. The five member Committee headed by a very distinguished and reputed lawyer, Barrister Ishtiaque Ahmad,

⁴⁰⁵ *The Daily Manabzamin* (Dhaka), 11 November 2000, 1.

⁴⁰⁶ The list of recommended four judges as sent to the President in order of seniority was as follows: 1) Justice K.M. Hasan, 2) Justice Golam Rabbani, 3) Justice Syed Modassir and 4) Justice Ruhul Amin. *The Daily Sangbad*, supra note 395.

⁴⁰⁷ *The Daily Star* (Dhaka), 11 January 2001, 1.

was given the task of pursuing the matter with the relevant authorities. Accordingly, the Committee met President Shahbuddin Ahmed on 13 January 2001 and requested him to elevate also the superseded two High Court Judges, Justice K.M. Hasan and Justice J. R. Mudassir, to the Appellate Division of the Supreme Court. The President told the five lawyers of the Committee that 'the proposal should have been given due consideration but he has constitutional limitations as he acts on the recommendation of the Prime Minister.'⁴⁰⁸ But the then Prime Minister refused to meet the members of the Committee showing firmness in her stand. On 15 January 2001, the then Minister of Law, Justice and Parliamentary Affairs made a statement before the Parliament stating that the appointment of Judges to the Appellate Division was not a matter of promotion and, as such, seniority was not the only criterion for making the appointment. In appointing judges to the Appellate Division competence, knowledge of law and commitment to rule of law were also to be taken into account.

However, the Chief Justice was urged by a group of the Supreme Court lawyers (considered as 'pro-opposition' lawyers) not to administer oath to Justice Golam Rabbani and Justice Ruhul Amin, elevated to the Appellate Division of the Supreme Court from the High Court Division superseding two senior Judges. But Chief Justice Latifur Rahman went ahead with the scheduled oath taking ceremony which was attended by all the judges of the Supreme Court. The ceremony took place on 10 January 2001 at his Chamber instead of the Judges Lounge due to the agitation. The judges were confined there for more than two hours by the agitating lawyers.⁴⁰⁹ They forced suspension of the Supreme Court's functioning on 11 January 2001. A case was filed against 16 'Pro-Opposition' Lawyers including B.N.P law-

⁴⁰⁸ *The Daily Star* (Dhaka), 14 January 2001, 1.

⁴⁰⁹ *The Daily Star* (Dhaka), supra note 407.

makers Barrister Nazmul Huda, Khandaker Mahbub Uddin Ahmed under the Public Safety Act for their involvement on 10 January's incident at the Supreme Court.⁴¹⁰

It is believed that Justice Ruhul Amin was rewarded for his verdict (although split one) in the *Bangabandhu Sheikh Mujibur Rahman Murder Case* as a member of the Death- Reference Bench of the High Court Division, while Justice K.M. Hasan, the senior most judge of the High Court Division, was victimised for feeling embarrassed to act as a member of the Death-Reference Bench. But the real motive in not elevating Justice K.M. Hasan to the Appellate Division of the Supreme Court was his previous connection with the opposition party (B.N.P) as divulged by the then Prime Minister herself in an address in a public meeting at Sitakunda on 17 January 2001 in which she said that the B.N.P. had wanted to appoint their former party leader, International Affairs Secretary, and ex-Ambassador, to the Appellate Division and, as such, to politicise the Supreme Court, which have duly been frustrated.⁴¹¹

However, the appointment of Justice Md. Gholam Rabbani and Justice Md. Ruhul Amin as Judges of the Appellate Division in supersession of two of their senior colleagues in the High Court Division (namely Justice K.M. Hasan and Justice Syed JR Mudassir Hossain) was challenged for the first time (by a junior advocate of the Supreme Court and the Secretary General of an NGO, the Bangladesh Human Rights Commission) before the High Court Division in the Case of *SN Goswami, Advocate v Bangladesh*.⁴¹² Justice Syed Amirul Islam, who delivered the judgment on 3 June 2001 declared the said appointment as lawful. As he observed:

Question of supersession can only arise in a case of promotion to a higher post. In the present case we are not concerned with the promotion of the judges of the High Court Division, to the Appellate Division. It is rather the appointment of two new judges in the Appellate Division

⁴¹⁰ *The Daily Star* (Dhaka), 17 January 2001, 1.

⁴¹¹ *The Daily Ittefaq* (Dhaka), 18 January 2001, 1.

⁴¹² 55 DLR (2003) 332.

which is in dispute. An appointment of a judge to the Appellate Division from amongst the judges of the High Court Division is not a promotion, it is a fresh appointment made by the President under Article 95(1) of the Constitution from amongst the qualified persons as contained in Sub Article (2) of Article 95 of the Constitution.... The actions of the President in the matter of appointment of judges of either Division of this Court are not unfettered in that in appointing a person in the judgeship of either Division the precedent condition as laid down in Article 95(2) has to be complied with. Once the requirements as laid down in Article 95(2) are fulfilled and the President acts on the advice of the Prime Minister, this Court cannot cause an inquiry as to the reason of appointing that person as a Judge. It is the absolute prerogative of the Executive under the existing provisions of the Constitution though prior to the 4th Amendment the position was otherwise.⁴¹³

It is noticeable that the learned Justice himself held that the qualification requirements as laid down in Article 95 of the Constitution are equally applicable to both the High Court and Appellate Divisions Judges. Thus the Constitution itself has not provided for any specific criteria such as number of cases disposed of as the High Court Division Judges demonstrating merits and qualities, handling of complex cases particularly involving constitutional issues, analytical ability and professional standard which are in higher demand for an Appellate Division Judge than a High Court Division Judge. Furthermore, there is no provision for the advertisement of vacant posts in the Appellate Division and selection of candidates by a judicial committee consisting of majority members from the apex court of the land. Therefore, the appointment of judges to the Appellate Division from amongst the High Court Division Judges appears to be in essence promotion rather than appointment.

With regard to the recommendation of the then Chief Justice that all the relevant four judges of the High Court Division were equally competent and that seniority should be respected, the learned Justice held:

⁴¹³ Ibid., at p. 342.

Be that as it may, if all the judges were equally competent, the Executive did not commit any illegality in choosing any two from the equal four inasmuch as there is no law or constitutional provision or convention, requiring the seniors to be appointed.⁴¹⁴

Thus it is evident that the convention of consulting the Chief Justice since 1978, as mentioned earlier, was unknown to learned Justice Syed Amirul Islam. However, he expressed his opinion by way of guidance as to the matters to be taken into consideration in appointing a judge of the High Court Division to the Appellate Division thus:

We are aware of the opinion that if a judge of this Division is elevated to the Appellate Division it should not be on the basis of seniority alone, rather it should be on the basis of seniority-cum-merit. The hard reality is that the quality of the judges of this Division, though are of a satisfactory level, all are not equal. Some are more brilliant than others. Thus, if seniority be the sole criterion for elevation then the most brilliant may be left behind and the less competent may be elevated to the Appellate Division simply because he was appointed a judge of this Division at an earlier point of time than the others. This will have the following effect on the highest judiciary; firstly, the most brilliant judges may be left behind though they could make better contribution to the judiciary. Secondly, if seniority-cum-merit becomes the criterion then right after the appointment of a judge in this Division he will do his best to improve the quality of his judgment and his overall performance as a judge and there will be a sense of competitiveness among the judges in performing their judicial duties. This will immensely benefit the nation as a whole and the judiciary in particular and the most meritorious will move ahead the less meritorious. The judges of this Division will then leave no stone unturned to devote themselves whole-heartedly to the job- day in and day out during the tenure of their office.⁴¹⁵

⁴¹⁴ Ibid at pp. 343-44.

⁴¹⁵ Ibid., at p. 349.

It is very difficult to agree with the above observations of the learned judges. For manifestation of merit and its objective assessment are very difficult to ascertain. If the President is to decide the matters, then it can be said in the words of Justice Syed Amirul Islam who in *State v Chief Editor, Manabjamine*⁴¹⁶ observed that:

Can the Government, namely, the major litigant, be justified in enjoying absolute authority in nominating and appointing its arbitrators? The answer would be in the negative. The executive cannot be allowed to enjoy the absolute primacy in the matter of appointment of judges as its "royal privilege". If such a process is allowed to continue, the independence of judiciary will never be attained.⁴¹⁷

Then if the Chief Justice alone is given the task of judging the merits of the judges of the High Court Division, again there is the possibility of particularly as apprehended by the same Judge in the aforesaid case:

... after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have and therefore we think that the matter should not be left in the hands of the learned Chief Justice alone and a better result would be derived if the opinion is formed in the matter of appointment of judges in the Full Court Meeting of the Supreme Court.⁴¹⁸

However, during the pendency of the *SN Goswami Case* and 17 days before the pronouncement of the Judgment, on 15 May 2001, Justice Md. Fazlul Karim, who gave decision in *Bangabandhu Murder Case* as the third member of the Death Reference Bench of the High Court Division, as mentioned earlier, was elevated to the Appellate Division in supersession of three senior judges- Justice K.M. Hasan, Justice Syed JR Mudassir Hossain and Justice Abu Sayeed Ahmed- by President Shahabuddin.

⁴¹⁶ Supra note 385.

⁴¹⁷ Supra note 386, at para 253.

⁴¹⁸ Ibid at para 248.

Thus the convention of seniority in appointing judges of the Appellate Division from amongst the High Court Division Judges was violated on five occasions during the Government of the Awami League and Justice K.M. Hasan and Justice JR Mudassir became the victim of the violation for two times.

A.2.10. Contravention of the Convention of Seniority in Appointing Judges of the Appellate Division During the Bangladesh Nationalist Party (B.N.P) Regime (2001-2006)

The B.N.P. Government, which came into power in October 2001 and remained in power till October 2006, adhered to the convention of following seniority in elevating judges to the Appellate Division from amongst the High Court Division Judges for about two years. Justice K.M. Hasan, who had been superseded twice, was elevated to the Appellate Division on 20 January 2002. About two months later, on 5 March 2002, Justice Syed JR Mudassir Hossain (who had also been superseded twice) and Justice Abu Syed Ahmed (who had been bypassed once) were appointed to the Appellate Division. Justice Kazi A.T.M Monowaruddin, Justice Fazlul Hoque and Justice Md. Hamidul Hoque were also appointed to the Appellate Division on 25 June 2002, 17 July 2002 and 29 June 2003 respectively without deviating from the principle of seniority. Therefore, it appears that the B.N.P. regime stood by the convention of seniority five times in appointing Appellate Division Judges.⁴¹⁹

But the B.N.P. regime departed from the convention of following seniority for the first time on 13 July 2003 when Justice MM Ruhul Amin was appointed to the Appellate Division in supersession of Justice Syed Amirul Islam who had given judgment in the *SN Goswami's Case* against the seniority rule of elevating judges to the Appellate Division. Justice Syed Amirul Islam was again superseded (for the second time) next month, on 27 August 2003, when Justice Md. Tofazzal Islam was appointed as a Judge of the Appellate Division. He was

⁴¹⁹ Supra note 395.

superseded for the third and fourth time while appointing Justice M. A. Aziz and Justice Amirul Kabir Chowdhury to the Appellate Division on 7 January 2004 and 26 February 2004 respectively. When Justice M. A. Aziz of the Appellate Division was appointed as the Chief Election Commissioner on 23 May 2005⁴²⁰, Justice Md. Joynul Abedin succeeded him to the Appellate Division superseding his three senior colleagues- Justice Syed Amirul Islam, Justice Md. Hassan Ameen, and Justice A.K. Badrul Hoque.⁴²¹

Thus it appears that Justice Syed Amirul Islam, who in SN Goswami's Case upheld the instance of supersession in appointing judges to the Appellate Division 'in the absence of constitutional provision or convention [sic]' and maintained that appointment should be made on the basis of 'seniority-cum-merit' which would instil a sense of competitiveness among the judges right after their appointments 'in per performing their judicial duties', failed to make an impression upon the President during the B.N.P. regime on five occasions as (to use his own words) 'the most meritorious' judge 'to move ahead the less meritorious' and paid back, indeed, in his own coin which might make him realise belatedly that in most cases of supersession, appointments of judges to the Appellate Division have been made on political considerations or affiliations rather than on merit.

A.2.11. Convention of Seniority in Appointing Judges of the Appellate Division During the Present Awami League Regime (January 2009- To Date, 2010)

The Supreme Judicial Commission in its first meeting held on 16 October 2008, as mentioned earlier, recommended four senior most judges of the High Court Division- Justice Shah Abu Nayeem Mominur Rahman, Justice Md. Abdul Quddus, Justice Md. Abdul Aziz and Justice Bijan Kumar Das- for filling two vacant posts of judge in the Appellate Division of the

⁴²⁰ Shakhawat Liton, 'Justice Aziz becomes CEC', *The Daily Star* (Online), 24 May 2005
<http://www.thedailystar.net/2005/05/24/d5052401011.htm> (accessed on 10 December 2010).

⁴²¹ Supra note 395.

Supreme Court. The then Supreme Judicial Commission Member and Supreme Court Bar Association's President, presently the Minister for Law, Justice and Parliamentary Affairs of the Awami League Government, criticised on 17 December 2008 the delay of two months for not appointing judges to posts lying vacant since July 2008. He termed the delay as 'unfortunate' and liable for non-setting up of two benches of the Appellate Division for hearing pending cases resulting in the increase of backlog of cases only to aggravate the sufferings of the litigants.⁴²² The same person, after assuming the office of the Minister for Law, Justice and Parliamentary Affairs, took another two months to get three, out of the four previously recommended High Court Division Judges (as in the meantime on 14 January 2009 Justice Quddus retired from the service), appointed on 4 March 2009 as the judges of the Appellate Division of the Supreme Court.⁴²³ After increasing the number of posts of judges in the Appellate Division of Supreme Court from seven to 11 (on 9 July 2009), President Zillur Rahman appointed on 14 July 2009 four senior most judges of the High Court Division- Justice Bijan Kumar Das, Justice ABM Khairul Haque, Justice Md Muzzammel Hossain and Justice Surendra Kumar Sinha- as the judges of the Appellate Division of the Supreme Court.⁴²⁴

Thus the present regime of the Awami League, which have had the previous track record of violating the convention of seniority in appointing the Chief Justice of Bangladesh and Judges of the Appellate Division on numerous occasions, have so far complied with the convention of seniority in appointing judges from the High Court Division to the Appellate

⁴²² Ashutosh Sarkar, 'Appellate Division running with fewer judges for long', *The Daily Star* (Dhaka), 18 December 2008, 1.

⁴²³ Staff Correspondent, 'SC Appellate Division gets 2 new judges', *The Daily Star* (Dhaka), 5 March 2009, 1.

⁴²⁴ Staff Correspondent, 'SC Appellate Division gets 4 more judges', *The Daily Star* (Dhaka), 15 July 2009, 1.

Division, perhaps, keeping in mind the present Supreme Court Bar Association's persistent and assiduous demand to conform to the principle of seniority in the 'promotion process'.⁴²⁵

A.3. Appointment of Judges of the High Court Division

The Constitution of Bangladesh, 1972 provides for the appointment of two types of judges—regular or permanent and additional judges to the High Court Division of the Supreme Court. Since the coming into force of the Constitution in December 1972, judges are initially appointed to the High Court Division as additional judges for a period of two years and then generally they are appointed as regular or permanent judges of the High Court Division.⁴²⁶ Thus additional judgeship has become a gateway for entering the cadre of permanent judgeship; in the words of Justice Desai 'Additional Judgeship became an entry door for becoming a Judge'⁴²⁷ of the High Court Division although it is not aimed at 'to form a training base for recruiting [permanent] judges from the training base to the permanent cadre.'⁴²⁸ Since an additional judge is appointed initially for a period of two years (which can be extended for 'a further period' and the judge concerned can be appointed as a regular judge) on the satisfaction of the President that the number of judges should 'be for the time being increased', it cannot be said that he is appointed on probation 'for trying out if he is fit to be a permanent judge.'⁴²⁹ Unlike a probationer, who can be sent out any time during the period of probation, the service of an additional judge cannot ordinarily be terminated before the expiration of his term. It was the British Government in India, which governed the Indo-Pak-Bangladesh Subcontinent nearly two hundred years until August 1947, for the first time introduced the system of appointing additional judges in the High Courts in the subcontinent

⁴²⁵ Ashutosh Sarkar, 'SC may get new judges next month', *The Daily Star* (Dhaka), 23 December 2010, 1.

⁴²⁶ Article 98, the Constitution of Bangladesh, 1972.

⁴²⁷ In *S.P. Gupta v Union of India*, 1981 Supp SC 87 at p. 618.

⁴²⁸ Justice Fazal Ali, *ibid* at p. 471.

⁴²⁹ Justice Gupta, *ibid* at p. 347.

under the Indian High Courts Act, 1911⁴³⁰, the Government of India Act, 1915⁴³¹, and the Government of India Act, 1935.⁴³² Although the Constitution of India, 1949 did not originally contain any provision regarding the appointment of additional judges as on the expiration of seat on the bench for short period they would have to go back to the bar which would give them a pre-eminence over their colleagues and embarrasses the subordinate Judges who were at one time under their control and thus instead of helping justice they act as a hindrance to free justice,⁴³³ the Constitution (Seventh Amendment) Act, 1956 incorporated into the Constitution the provisions concerning the appointment of additional judges.⁴³⁴ In the 1956 Constitution of Pakistan (the first Constitution of the Country), there was no provision concerning appointment of additional judges in the High Courts and, as such, judges in the High Courts initially were appointed permanently. But the 1962 and 1973 Constitutions of Pakistan provided for the appointment of additional judges even against the permanent vacancies.⁴³⁵

It may be recalled here the original provisions of Article 95(1) of the 1972 Constitution of Bangladesh concerning the appointment of judges of the Supreme Court which provided that

⁴³⁰ Section 3 of the Indian High Courts Act, 1911 empowered the Governor-General-in-Council to appoint from time to time persons to act as Additional Judges of any High Court for such period not exceeding two years as may be required.

⁴³¹ Clause (i) of the proviso to subsection (2) of Section 101 of the Government of India Act, 1915 authorised the Governor-General-in-Council to appoint persons to act as additional judges of any High Court for such period not exceeding two years as may be required.

⁴³² Section 222(3) of the Government of India Act, 1935 provided for the appointment of Additional Judges thus: 'If by reason of any temporary increase in the business of any High Court or by reason of arrears of work in any such Court, it appears to the Governor-General that the number of the Judges of the Court should be for the time being increased, the Governor-General (in his discretion) may, subject to the foregoing provisions of this chapter with respect to the maximum number of Judges, appoint persons duly qualified for appointment as Judges of the Court for such period not exceeding two years as he may specify.'

⁴³³ Tej Bahadur Sapru said in Indian Constituent Assembly. Quoted in 1981 Supp SCC 87 at 235.

⁴³⁴ Amended Article 224 (substituted) provides that '(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that the number of the judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be Additional Judges of the Court for such period not exceeding two years as he may specify.'

⁴³⁵ Article 96 of the 1962 Constitution of Pakistan provided that an Additional Judge could be appointed against a permanent vacancy or when a High Court Judge was absent or was unable to perform the functions of his office due to any other cause or for any reason it is necessary to increase the number of judges of a High Court for a period not exceeding two years. These provisions have been reproduced in Article 197 of the 1973 Constitution of Pakistan.

the other judges of the Supreme Court 'shall be appointed by the President after consultation with the Chief Justice.' Thus Article 95(1) deals with the appointment of regular or permanent judges to both the High Court Division and the Appellate Division of the Supreme Court after consultation between the two very high dignitaries, namely, the President and the Chief Justice of Bangladesh. On the other hand, Article 98 of the Constitution deals with the appointment of the additional judges to the High Court Division and *ad hoc* judges to the Appellate Division of the Supreme Court. As Article 98 provides that:

Notwithstanding the provisions of Article 94, if the President is satisfied, after consultation with the Chief Justice⁴³⁶, that the number of the judges of a division of the Supreme Court should be for the time being increased, the President may appoint one or more duly qualified persons to be additional judges of that division for such period not exceeding two years as he may specify, or if he thinks fit, may require a judge of the High Court Division to sit in the Appellate Division for any temporary period:

Provided that nothing in this article shall prevent a person appointed as an additional judge from being appointed as a judge under article 95 or as an additional judge for a further period under this article.

Thus unlike the Indian Constitution as amended in 1956, which provides for two specified situations-(i) temporary increase in the business of a High Court and ii) temporary increase in arrears of work therein- in which the power of appointing the additional judges by the President can be exercised and if neither of the situation is present there can be no question of exercising the power⁴³⁷, the Constitution of Bangladesh does not spell out any specific reason for the appointment of additional judges to the High Court Division of the Supreme Court; it has left the matter on the subjective satisfaction of the President, of course, after mandatory

⁴³⁶ The words 'after consultation with the Chief Justice' have been added to Article 98 in pursuance of a proposal moved by a Member of the Constituent Assembly. *The Constituent Assembly Debate*, vol. 2 (issue 1-19) (Dhaka: Assistant Controller of Publications, 1972), at pp 601-2.

⁴³⁷ Supra note 434.

consultation with Chief Justice, to the effect that the number of the judges of a division of the Supreme Court should be for the time being increased.

Although the words 'for the time being' clearly indicate that the increase in the number of judges by appointing additional judges would be for a short period or to deal with a temporary situation, the provision for appointment of an additional judge as a regular judge or his extension 'for a further period, as contained (unlike the 1949 Indian and 1973 Pakistan Constitutions) in proviso to Article 98, may generate in him the hope and legitimate expectation while accepting the offer that he would not have to go back on the expiration of his term; he would either get a berth as a permanent judge or reappointed as an additional judge for a further period. Furthermore, this expectation generated in the minds of an additional judge by reason of such a practice, save in rare cases, followed for almost 38 years. Since the qualification requirements for the appointment of both the permanent and additional judges, as mentioned earlier, are the same and their status (except that an additional judge can hold office for the period specified in the warrant of his appointment) as well as functions are the same, it seems unjustified to appoint additional judges when there is need to appoint permanent judges and the practice of treating Article 98 as a gateway through which every High Court Division judge is required to pass before being appointed as a permanent judge. For, an additional judge appointed for two years can hardly be expected to deal with cases, particularly in which the executive is involved, as independently and fearlessly as a permanent judge can be expected; pronouncement of a fair and fearless judgment against the executive, which is the largest single litigant before the High Court Division, may cost him either appointment as a regular judge or 'for a further period.' Furthermore, a litigant's confidence in the impartiality and independence of an additional judge, whose continuance in office after the specified period is subject to the will of the executive, is bound to suffer thinking that the judge is likely to be biased. Therefore, the system of appointment of

additional judges, to use the words of the Montreal Declaration on the Independence of Justice, 1983, as pointed out earlier, 'is inconsistent with judicial independence' and, as such, calls for phasing out gradually where such appointments exist.⁴³⁸

However, both Articles 95(1) and 98 of the 1972 Constitution of Bangladesh, which provide for the general rules regarding appointments of regular judges and additional judges respectively, stipulated the consultation with the Chief Justice of Bangladesh as a constitutional imperative in the matter of appointment of judges by the President to the Supreme Court. For, the Chief Justice is best suited and equipped to know the advocates and the judicial officers intimately and assess objectively their legal expertise, soundness, legal experience, professional attainment, ability to handle cases, ability to analyse and articulate, personal integrity, judicial temperament and firmness in order to select the most suitable amongst the best available candidates for appointment as judges of superior court. Sir Winston Churchill, former Prime Minister of the United Kingdom, aptly said in the House of Commons on 23 March 1954 that: 'Perhaps only those who have led the life of a Judge can know the lonely responsibility which rests upon him.'⁴³⁹ It is the Chief Justice who is eminently suited to weigh and evaluate the legal ability, potential capacity, quick thinking, integrity, reputation of the person under consideration in legal profession or judicial service and, as such, to select 'Daniel to sit in the Solomon's chair,' the outstanding and meritorious judge, in the words of Shakespeare, 'A Daniel come to judgment! yea, a Daniel.'⁴⁴⁰

During the British rule in the Indian Subcontinent, appointment of judges of the Federal Court and the High Courts were in the absolute discretion of the Crown, there was no specific provision in any law for consultation with the Chief Justice in the appointment process. The Indian Constitution of 1949 which, as mentioned earlier, after the UK envisaged a scheme of

⁴³⁸ Article 2.20, the Montreal Declaration on the Independence of Justice, 1983.

⁴³⁹ Parliamentary (House of Commons) Debates (Hansard), Vol. 525 (1954), at para 1061.

⁴⁴⁰ William Shakespeare, *The Merchant of Venice* (London: I.R. for Thomas Heyes), act 4, sc. 1, l. at pp. 223-4.

consultation by the executive with the constitutional functionaries including the Chief Justice of India, who are *ex hypothesi* well qualified to give expert opinion for appointing the best available candidates for appointment as judges of the superior courts. The 1956 and 1962 Constitutions of Pakistan accepted the Indian scheme of consultation except consultation with such of the judges of the Supreme Court and of the High Courts in the States as the President may deem necessary. The 1972 Constitution of Bangladesh accepted consultation with only one constitutional functionary- the Chief Justice of Bangladesh- in appointing by the President the judges of the High Court Division and Appellate Division of the Supreme Court. But it did neither concede primacy to the views of the Chief Justice of Bangladesh nor were his views binding on the executive. Furthermore, the framers of the Constitution of Bangladesh did not discuss and debate the word 'consultation' in the Constituent Assembly from 12 October to 4 November 1972 in connection with the appointment of judges of the apex court and the fixing of its parameter.⁴⁴¹

4.3.1. *Lexicon Meaning of Consultation*

In common parlance, consultation, which is used in connection with lawyers or with the physician, or with engineer etc., means seeking opinion or advice or aid or instruction or views of a person by another person on any given topic through correspondence or sitting across the table. The dictionary meanings of consultation are:

1. The action of consulting or taking counsel together 2. a conference in which the parties e.g. lawyers or medical practitioners, consult and deliberate.⁴⁴²

.... a meeting for deliberation, discussion or decision.⁴⁴³

Act of consulting patient with doctor; client with lawyer ...⁴⁴⁴

⁴⁴¹ *The Constituent Assembly Debate*, supra note 436, at pp 595-99.

⁴⁴² Shorter Oxford English Dictionary.

⁴⁴³ Webster's Encyclopedia Unabridged Dictionary of the English Language.

consult means to seek opinion or advice of another, ... to deliberate together to take counsel to bring about.⁴⁴⁵

In *Corpus Juris Secundum*, the word 'consultation' has been defined thus:

generally as meaning the act of consulting; deliberation with a view to decision; and judicially as meaning the deliberation of two or more persons on some matter; also a council or conference to consider a special case. In particular connections, the word has been defined as meaning a conference between the counsel engaged in a case, to discuss its question or to arrange the method of conducting it, the accepting of the services of a physician, advising him of one's symptoms, and receiving aid from him.⁴⁴⁶

A.3.2. Judicially Interpreted Meaning of Consultation

However, the word 'consultation' has been judicially interpreted in various cases in different jurisdictions. Justice K. Subba Rao of the Madras High Court interpreted the word 'consult' in general and specific (i.e. in the public authority context) senses in *R. Pushpam v State of Madras*.⁴⁴⁷ As he observed:

The word 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution. Such a consultation may take place at a conference table or through correspondence.... It is necessary that the consultation shall be directed to the essential points and to the core of the subject involved in the discussions.... A consultation may be between an uninformed persons and an expert or between two experts. A patient consults a doctor; a client consults his lawyer; two lawyers or two doctors may hold consultations between themselves. In either cases the final decision is with the consutor, but he will not generally ignore the advice except for good reasons. So too in the case of a pubic authority. Many

⁴⁴⁴ Black's Law Dictionary.

⁴⁴⁵ Words and Phrases- Permanent Edition.

⁴⁴⁶ *Corpus Juris Secundum*, Vol. 16-A, at p. 1243.

⁴⁴⁷ AIR 1953 Mad 392.

instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty. It is true that the final order is made and the ultimate responsibility rests with the former authority. But it will not, and cannot be, a performance of duty if no consultation is made, and even if made, is only in formal compliance with the provisions. In either case the order is not made in compliance with the provision of the Act.⁴⁴⁸

Thus the essence of Justice K Subba Rao contention is that in cases of consultation between an uninformed person and an expert or between two experts or between a public authority and another authority, the final decision will lie with the consultor although it is expected that he will not generally ignore the consultee's advice except for good reasons.

In the same vein, Justice Ahmadi of the Indian Supreme Court defined consultation in *Supreme Court Advocates-on-Record Association v Union of India*⁴⁴⁹ thus:

The word "consult" as understood in ordinary parlance means to ask or seek advice or the views of a person on any given subject i.e. to take counsel from another, but it does not convey that the consultant is bound by the advice. In certain situations an expert in the field may be consulted but it is only to help the consultant take a final decision. But consulting even an expert the consultant does not mortgage his decision, the advice given is only an input among the various factors which enter decision making. He may consult one or more experts and he may accept the advice he considers most acceptable or rational but he is always free to reach his own conclusion. It is ultimately his responsibility to reach a sound decision and he is accountable for the same.⁴⁵⁰

⁴⁴⁸ Ibid.

⁴⁴⁹ (1993) 4 SCC 441.

⁴⁵⁰ Ibid., at p. 622.

But in *Port Louis Corpn v Attorney-General, Mauritius*⁴⁵¹, the Judicial Committee of the Privy Council observed: 'consultation.... is not a one way process but a two way process.... The requirement of consultation is never to be taken perfunctorily or as a mere formality.'⁴⁵² Similarly Justice Webster in *R.V. Secretary of State for Social Service, ex parte Association of Metropolitan Authorities*⁴⁵³ observed: '.... the essence of consultation is the communication of a genuine invitation [with sufficient information] to give [helpful] advice and a genuine consideration of that advice....'⁴⁵⁴

A.3.3. *Judicial Interpretation of Conventional Consultation with the Chief Justice in Bangladesh*

The Supreme Court of Bangladesh did not have any occasion to interpret the word 'consultation' with the Chief Justice by the President so long it was mentioned in Article 95(1) in connection with the appointment of puisne judges of the Supreme Court (comprising of the High Court Division and Appellate Division) and in Article 98 in the context of appointment of additional judges in the High Court Division. In January 1975, the Constitution (Fourth Amendment) Act, which is considered as a draconian amendment as it introduced basic and crucial changes in the Constitution, deleted the provision of consultation with the Chief Justice by the President from the aforesaid Articles in appointing judges to the Supreme Court; the amended provision read: 'The.... Judges shall be appointed by the President.'⁴⁵⁵ Thus this amended method became completely identical with that of the method of appointment provided for by the Government of India Act, 1935 regarding the appointment of Federal Court judges during the British Raj in India. As it was provided that: 'every Judge of the Federal Court shall be appointed by His Majesty by warrant under the

⁴⁵¹ 1965 AC 1111 (PC).

⁴⁵² Ibid.

⁴⁵³ (1986) 1 All ER 164.

⁴⁵⁴ Ibid., at p. 167.

⁴⁵⁵ Amended Article 95(1), the Constitution of the People's Republic of Bangladesh, 1972.

Royal Sign Manual.⁴⁵⁶ Thus like the Crown during the British Raj in India, the President of Bangladesh was given absolute discretion to make judicial appointment without any kind of limitation. As to the implication of this sort of arrangement Dr. B. R. Ambedkar said in the Indian Constituent Assembly that it is 'dangerous to leave the appointments to be made by the President, without any kind of reservation or limitation, that is to say, merely on the advice of the executive of the day.'⁴⁵⁷ For, neither the President can generally be expected to have knowledge about the professional attainment, legal acumen, integrity, temperament and suitability of those advocates/judicial officers functioning within the judicial sphere from whom he can select the right person for appointment as judges nor can it be ensured that in assessing their worth and fitness, political bias or personal favouritism play any part in the appointment of judges. It should also be stressed here that the provision of consultation with the Chief Justice by the President in appointing additional judges to the High Court Division, was also done away with from Article 98 by the Constitution (Fourth Amendment) Act, 1975 and, as such, he has been given unrestricted authority to appoint additional judges on the advice of the Prime Minister. However, the constitutional provisions of consulting the Chief Justice by the President in appointing judges of the Supreme Court, dispensed with by the civilian regime of the Awami League, was restored by the Martial Law regime (1975-1979) on 28 May 1976. But prior consultation with the Chief Justice by the President as an essential prerequisite lasted only one and a half year as in November 1977 the appointment of judges of the Supreme Court in Bangladesh was again made a matter of pleasure vested in the President liberating him from mandatory obligation of consulting the Chief Justice.

But the convention of consulting the Chief Justice in appointing judges of the Supreme Court, as mentioned earlier, was established in 1978 by the then President and Chief Martial Law Administrator Major-General Ziaur Rahman. Later on, this convention of consulting the

⁴⁵⁶ Section 200(2), the Government of India Act, 1935.

⁴⁵⁷ Quoted in (1993) 4 SCC 441, at p. 563.

Chief Justice was later on observed although the matter was not reflected in the Bangladesh Gazette Extraordinary relating to the appointment of judges of the Supreme Court. But it is difficult to accept the mere assertion of learned Justice Md. Abdul Matin (without showing any authority) who in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocate*⁴⁵⁸, held that: 'This convention was however breached by the executive in 1994 when 9 Additional Judges were appointed to the High Court Division without consultation with the Chief Justice.'⁴⁵⁹ For, the 1982 (i.e. Second) Martial Law Regime of Lt. General Hussain M. Ershad could hardly be expected to observe the convention of consulting the Chief Justice in appointing the judges of the Supreme Court as he (Ershad), unlike the 1975 Martial Law Regime, suspended the 1972 Constitution of Bangladesh⁴⁶⁰, assumed as the Chief Martial Law Administrator not only the legislative but also the executive authority (which should have been given to the President) including the power to appoint the Chief Justice, permanent judges and additional judges 'from among Advocates of the Supreme Court or judicial officers'⁴⁶¹ irrespective of their length of experience (contrary to the Constitutional requirement of the Supreme Court advocates having at least 10 years standing practice or judicial officers having not less than 10 years experience) and to remove the Supreme Court judges 'without assigning any reason'⁴⁶² (contrary to constitutional provision for removal by the President on the recommendation of the Supreme Judicial Council on the grounds of proved misbehaviour or incapacity). Furthermore, unlike Chief Justice Kemaluddin Hussain (appointed as the Chief Justice by the First Martial Law Regime headed by Major General Ziaur Rahman in February 1978), who disclosed in Ibrahim Memorial Lecture in 1984 about the establishment of convention of consultation, Chief Justice F. K. M. A. Munim, who replaced Justice Kemaluddin Hussain on 11 April 1982 in pursuance of the

⁴⁵⁸ 38 CLC (AD) 2009.

⁴⁵⁹ Ibid., at para 182.

⁴⁶⁰ The Proclamation of Martial Law, 24 March 1982.

⁴⁶¹ The Proclamation (First Amendment) Order, 11 April 1982.

⁴⁶² Ibid.

enactment of a new provision fixing the tenure of the Chief Justice at three years irrespective of attaining or not attaining the retirement age of 65 years⁴⁶³, never said anything about the continuance of the convention of consulting the Chief Justice in appointing judges of the Supreme Court by the Chief Martial Law Administrator. It is very pertinent to mention here that it is the same Chief Martial Administrator H. M. Ershad who on 11 December 1983 finally replaced his appointee Justice A. F. M. Ahsanuddin Chowdhury as the President of the Country, the Chief Martial Law Administrator was substituted for the President as the appointing and removal authority of the judges of the Supreme Court.⁴⁶⁴

However, it is striking that the non-observance of the convention of consulting the Chief Justice in appointing additional judges to the High Court Division on 2 February 1994 by the President was for the first time made a contentious issue by the then Chief Justice Shahabuddin Ahmed himself in the Annual Conference of the Bar Council, held on 3 February 1994, when he apprised the gathering in his inaugural address that he had been 'Mr. Nobody' in the matter of appointment of the said nine judges of the Supreme Court. The Conference adopted a resolution unanimously disapproving the appointment of these judges and demanded the cancellation of the relevant gazette notification. Furthermore, the Chief Justice was requested not to administer oath to the newly appointed Judges.⁴⁶⁵ Moreover, 'on

⁴⁶³ Ibid.

⁴⁶⁴ H.M. Ershad as the Chief Martial Law Administrator appointed from January to July 1983 four additional judges to the High Court Division of the Supreme Court (of which one was Joint Secretary of the Ministry of Law, Justice and Parliamentary Affairs and another three were Advocates of the Supreme Court) for a term of two years. (The Bangladesh Gazette Extraordinary, 17 January 1983 No. JIV/1H-1/83/50), 20 July 1983 (No. 4351G)). After assuming the office of President, he in December 1983 appointed three Deputy Attorney-Generals, one advocate of the Supreme Court and one district judge, altogether five, as the additional judges of the High Court Division for a period of two years. (Ibid., 29 December 1983). In May 1984, he appointed three additional judges (of which one District Judge, one advocate of the Supreme Court and one Deputy Attorney-General) [Ibid., 29 May 1984.], in July 1985 one (an advocate of the Supreme Court) and in December 1985 two (one district judge and one advocate of the Supreme Court) as the additional judges of the High Court Division of the Supreme Court. It seems that the decentralisation of the (one) High Court Division and establishment of its new seven permanent benches [Notification No. S. R. O 175-L/82, 8 June 1982, Notifications of 7 July 1983, 3 August 1983 and 27 December 1983] outside the capital Dhaka to bring the apex court to the door-step of the common men for obtaining prompt justice at lesser expenses necessitated the appointment of 15 additional judges.

⁴⁶⁵ *The Daily Star (Dhaka)*, 5 February 1994.

3rd of February, a Full Court Meeting consisting of all the judges of both the Divisions of this Court [the Supreme Court] unanimously resolved authorising the Chief Justice not to administer oath to the newly appointed judges.⁴⁶⁶ Accordingly, the Chief Justice, after consultation with all other judges of the Supreme Court, deferred the swearing to the newly appointed nine Judges for two days so that the President and the Prime Minister could be approached to resolve the matter. A delegation of senior and prominent members of the Supreme Court Bar met the then President Abdur Rahman Biswas, and Prime Minister Begum Khaleda Zia and requested them not to violate the convention of consulting the Chief Justice in the matter of appointment of Judges to the Supreme Court established by their late leader President Ziaur Rahman. They responded by cancelling the earlier Gazette Notification regarding the appointment of the nine judges. On 9 February 1994, the President appointed nine additional judges of the High Court Division after consulting the Chief Justice, dropping two of the original nine names (one of them was the then Law Secretary who hailed from the village of the Chief Justice) and replacing them with two new names (Md. Hamidul Haque and MM Ruhul Amin). The new notification for the first time, as an official recognition of the convention of consultation with the Chief Justice, spoke about the appointment of the judges to the High Court Division by the President in consultation with the Chief Justice.⁴⁶⁷

In June 2001, the nature, binding force and primacy of constitutional consultation was for the first time examined by Justice Syed Amirul Islam in *S. N. Goswami, Advocate v Bangladesh*.⁴⁶⁸ As he held that:

⁴⁶⁶ Justice Amirul Islam in *State v Chief Editor, Manabjamin*, 31 CLC (HCD) (2002), Part 2, para 222 <http://clcbd.org/judgments/18-criminal-law/3806-state-vs-chief-editor-manabjamin-and-others-2002-31-clc-hcdpart-two.html> (accessed on 10 December 2010).

⁴⁶⁷ Notification S/R.O. No. 54- Law/94, Ministry of Law, Justice and Parliamentary Affairs (People's Republic of Bangladesh), Justice Section-4, 9 February 1994.

⁴⁶⁸ Supra note 412.

In making appointment of a Judge of the Supreme Court the President is under no obligation, legal or constitutional, to consult Chief Justice.... after the 4th Amendment of the Constitution.... [The] conventional consultation... has no binding force, for it is not a rule of law. This sort of consultation cannot have primacy.⁴⁶⁹

But the same Justice in 2002 *State v Chief Editor, Manabjain*⁴⁷⁰, which was a Criminal Miscellaneous Contempt Case (of 2000) concerning a news item published in the newspaper as to whether that undermined the authority of the Supreme Court, entered into an uncalled for academic discussion as to the importance of consulting the Chief Justice in appointing judges to the Supreme Court. As he observed that

The concept of independence of judiciary cannot be ensured unless the exclusion of the final say of the Executive in the matter of appointment of judges is done away.... and to find out the suitable persons for such appointments the expertise for that purpose is only available with the judiciary.... the process of consulting the Judiciary is to enable the appointments to be made of persons not merely qualified to be Judges, but also those who would be the most appropriate to be appointed, then the said purpose would be defeated if the appointing authority is left free to take its "our final" decision by ignoring the advice of the judiciary....⁴⁷¹

Then in defining the nature and binding effect of consultation, Justice Amirul Islam used the words which are exact reproduction (without acknowledging the author) of the observations of Justice Kuldeep Singh in *Supreme Court Advocates-on-Record Association v Union of India*.⁴⁷² As he held: 'The "consultation", therefore, is between a layman (the Executive) and a specialist (the judiciary). It goes without saying that the advice of the specialist has a

⁴⁶⁹ Ibid.

⁴⁷⁰ Supra note 385.

⁴⁷¹ Ibid., at para 247.

⁴⁷² (1993) 4 SCC 441.

binding effect.⁴⁷³ He further laid down the manner in which the Chief Justice should form his opinion which shall have primacy:

we are of the firm conviction that in the matter of appointment of judges of the High Court Division of this Court a prior consultation with the Full Court ["Meeting of all the Judges of the Supreme Court"] is a must and their opinion must have a primacy and be binding on the Executive.... Therefore the consultation with the judiciary is not only mandatory but the Executive is bound by the advice given in the process of consultation by the Chief Justice on recommendation of the Full Court.⁴⁷⁴

Justice Amirul Islam summarised his views regarding the matter of consultation with the Chief Justice in the matter of appointment of judges of the Supreme Court thus:

In conclusion we would like to say our social needs dictate:

Like the Pope, enjoying supremacy in the ecclesiastical and temporal affairs, the resolution of the Full Court being the highest judicial opinion, has a Tinge of primacy, if not supremacy to be recorded, affairs concerning the highest judiciary.... a right step.... that... alone will ensure optimum benefits to the society by ensuring rule of law.⁴⁷⁵

This like the majority view in the case of the *Supreme Court Advocates-on Record Association v Union of India*⁴⁷⁶, Justice Amirul Islam held that the opinion of the Chief Justice must have a primacy. But unlike the majority view in that case, in which the Chief Justice was required to form his opinion in consultation with two senior most judges of the (Indian) Supreme Court⁴⁷⁷, he observed that the Chief Justice, who according to him (in fact, the words are of Dr. B. R. Ambedkar who said in a debate on the judiciary in the Constituent Assembly), 'is a man with all the failings, all the sentiments and all the prejudices which we

⁴⁷³ See for comparison *ibid.* at p. 165 and *supra* note 471.

⁴⁷⁴ *Supra* note 471.

⁴⁷⁵ *Ibid.*, at para 252.

⁴⁷⁶ *Supra* note 471.

⁴⁷⁷ *Ibid.* at pp. 701-2.

as common people have and therefore we think that the matter should not be left in the hands of the learned Chief Justice alone.⁴⁷⁸ The Chief Justice is required to form his opinion in the matter of appointment of judges in the Full Court Meeting of the Supreme Court- the meeting of all the judges of the High Court Division and Appellate Division of the Supreme Court. The learned Justice failed to appreciate that, unlike the Indian Constitution, the word 'consultation' has deliberately been omitted twice from Articles 95(1) and 98 of the Bangladesh Constitution. Therefore, to interpret the conventional consultation to mean that the Chief Justice's opinion in the matter of appointing judges of the Supreme Court is to be formed in the full meeting of the Supreme Court and the opinion thus formed must have primacy tantamount to rewriting these two Articles. It seems that to indulge in interpreting an important constitutional issue out of the way and collaterally is a sheer judicial activism. As the Supreme Court of Bangladesh in *Kudrat-E-Elahi Panir v Bangladesh*⁴⁷⁹ observed:

the... decision.... made on hypothetical facts... as a rule, the Courts always abhor. The Court does not answer merely academic question but confines itself only to the point/points which are strictly necessary to be decided for the disposal of the matter before it. This should be more so when Constitutional questions are involved and the Court should be ever discreet in such matters. Unlike a civil suit, the practice in Constitutional cases has always been that if the matter can be decided by deciding one issue only no other point need be decided.⁴⁸⁰

To the same effect, Thomas M. Cooley more forcefully said:

the courts.... will not go out of their way to find such topics [i.e. constitutional questions]. They will not seek to draw in such weighty matters collaterally nor on trivial occasions. It is both more proper and more respectable to a coordinate department to discuss constitutional questions only when that is very *lis mota*. Thus presented and determined, the decision carries

⁴⁷⁸ Supra note 472.

⁴⁷⁹ 44 DLR (AD) 319.

⁴⁸⁰ Ibid.

a weight.... In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, the court will take that course and leave the question of constitutional power to be passed upon when a case arises which cannot be otherwise disposed of, and which consequently renders a decision upon such question necessary.⁴⁸¹

However, ultimately in March 2009, Justice Md. Joynul Abedin of the Appellate Division of the Supreme Court in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocates and others*⁴⁸² the observation of Justice Syed Amirul Islam, that in the matter of appointment of judges to the superior judiciary the opinion of the judiciary expressed through the Chief Justice of Bangladesh has primacy, terming it as an unsound proposition of law.⁴⁸³

In *Md. Idrisur Rahman, Advocate and others v Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of the People's Republic of Bangladesh*⁴⁸⁴ the non-appointment of ten additional judges by the President as permanent judges to the High Court Division of the Supreme Court despite favourable recommendation of the Chief Justice was challenged. Justice Md. Abdur Rashid of the Special Bench (consisting of three learned Judges) while issuing direction on 17 July 2008 to the Government to appoint them (ten additional judges), as permanent judges (later on appeal, it was overruled), observed that: 'Absence or omission of the requirement for consultation with the Chief Justice could not be pleaded as a defence of any arbitrary exercise of power of appointment.... of Judges in the

⁴⁸¹ Thomas M. Cooley, *A treatise on the constitutional limitations which rest upon the legislative power of the states of the American union* (Boston: Little, Brown, and Company, 1878) at p. 163.

⁴⁸² 38 CLC (AD) 2009.

⁴⁸³ Ibid., at para 75.

⁴⁸⁴ 37 CLC (HCD) 2008.

Supreme Court⁴⁸⁵ and, that, 'Existence of guidelines or norms of general application excludes any arbitrary exercise of discretionary powers.'⁴⁸⁶ Therefore, Justice Md. Abdur Rashid arrived at 12 conclusions as to the norms and process for appointment and non-appointment of Judges to the Supreme Court of which six are relating to consultation with the Chief Justice of Bangladesh by the President in the matter of appointment of regular judges to the High Court Division and Appellate Division, and four are concerning consultation in the context of appointment or non-appointment of an additional judge to the High Court Division of the Supreme Court. The six guidelines as to the import and scope of consultation with the Chief Justice in the matter of appointment of regular judges of the Supreme Court are:

- (ii) the opinion of the Chief Justice of Bangladesh in the matter of appointment of Judges to the Supreme Court is entitled to have the primacy;
- (iii) in case of appointment to the High Court Division, the Chief Justice shall consult with two senior most Judges of the Appellate Division and equal number of Judges of the High Court Division to form his opinion and he shall also consult senior members of the Supreme Court Bar and the Attorney-General; and in the case of appointment of Judges to the Appellate Division, he shall consult with three senior-most Judges of the Appellate Division to form his opinion;
- (iv) the President or the Government shall have no right to directly initiate the process for appointment of Judges to the Supreme Court bypassing the Chief Justice of Bangladesh but the President/ Government shall have the right of suggesting the names of suitable candidates for consideration of the Chief Justice for appointment to the Supreme Court;
- (v) the non-appointment of anyone recommended, on the ground of unsuitability, must be for good reasons, disclosed and conveyed to the Chief Justice with the reasons, materials and

⁴⁸⁵ Ibid., at para 94.

⁴⁸⁶ Ibid.

information to enable him to reconsider and withdraw his recommendation. If the Chief Justice after consultation with the above Judges in respect of particular appointments in the Division concerned, does not find it necessary to withdraw and again recommended, then the President must adhere to such recommendation;

(vi) the President as a rule shall accept the recommendation of the Chief Justice for appointment of Judges. If the recommendation of the Chief Justice for appointment or non-appointment of any person as a Judge either to the High Court or the Appellate Division could not be accepted by the Government, it cannot outright, reject such recommendation and go ahead with appointment of persons of its own choice. The Government in such case shall send the recommendation back to the Chief Justice for reconsideration on the reasons supported by materials and information conveyed by the Government;

(vii) after consideration of the reasons of the Government along with the materials and the information conveyed, the Chief Justice may withdraw his recommendation. But if he again recommends the same recommendation after consultation with the aforesaid senior-most Judges of the Appellate Division for appointment, the Government shall be obliged to complete the process of appointment.⁴⁸⁷

The following four norms deal with the import of consultation in the frame of reference to appointment or non-appointment of an additional judge:

(viii) appointment or non-appointment of an Additional Judge as Judge under Article 95 of the Constitution by the executive disregarding the recommendation of the Chief Justice violates the Constitution;

(ix) when the executive may not accept such recommendation of the Chief Justice for reasons to be recorded, it may request the Chief Justice for reconsideration on the materials and information conveyed;

⁴⁸⁷ Ibid., at para 152.

(x) the Chief Justice shall then reconsider the case on the materials and information furnished, and if after such reconsideration, he again recommends for appointment or non-appointment, the executive would be left with no choice but to complete the process of appointment of such an Additional Judge on the basis of such recommendation;

(xi) after successful conclusion of the period under Article 98, an Additional Judge acquires legitimate expectation and he becomes entitled to be considered for appointment under Article 95 of the Constitution in the absence of positive valid reason(s) to be recorded by the Executive.⁴⁸⁸

Thus Justice Abdur Rashid accorded primacy to the opinion of the Chief Justice of Bangladesh in the matter of appointment of judges to the Supreme Court, which seems to be tricky as there are no other constitutional functionaries mentioned in Articles 95(1) and 98 of the Constitution over whose opinions the opinion of the Chief Justice shall have primacy. In fact, he might have meant that the President would be bound by the opinion of the Chief Justice. Thus the exclusive power of the President to appoint judges of the Supreme Court as 'royal privilege' has virtually been taken away to maintain the cardinal feature of independence of judiciary so that no appointee judge bears a particular stamp for the purpose of changing the cause of decisions 'bowing to the dictate of his appointing authority.' The Chief Justice was required to form his opinion by stifling his individual voice, in case of appointment to the High Court Division consultation not only with two senior most judges of the Appellate Division and two judges of the High Court Division but also with senior members of the Supreme Court Bar and the Attorney General. Thus the element of plurality in the formation of opinion of the Chief Justice is to be achieved not only by obtaining the views of two senior most judges of each of the two Divisions of the Supreme Court but also with one or more from the 'broad band' of members of the Supreme Court Bar and the

⁴⁸⁸ Ibid.

principal law officer of the Government, the Attorney General. In neither of the Indian Supreme Court's decision in the *Supreme Court Advocates-on Record Assn v Union of India*⁴⁸⁹ (the Second Judges' Case) and *Special Reference No. 1 of 1998*⁴⁹⁰ (the Third Judges' Case), to which Justice Abdur Rashid adhered to in formulating his norms, the Chief Justice was required to travel beyond the four corners of the Supreme Court, i.e. fellow judges of the Court, in the formation of his opinion as an 'inbuilt check against his likelihood of arbitrariness or bias, even subconsciously.' However, in case of appointment of judges to the Appellate Division, the zone of consultees has not been so stretched out; the Chief Justice in forming his opinion was required only to consult three senior most judges of the Appellate Division. Thus it is evident that the Special Bench of three judges did not keep in mind that the right conferred on the Chief Justice by Article 95(1) and 98 of the Constitution of Bangladesh to be consulted in the matter of appointment of judges of the Supreme Court by the President has deliberately been dispensed with twice- first on 25 January 1975 and after its restoration in May 1976 again on 27 November 1977 and even in the original Articles there was no provision for plurality of consultation by the Chief Justice in the formation of his opinion. Thus, there is hardly any scope of giving such a wide the connotation to ex gratia or conventional consultation with the Chief Justice in appointing judges of the apex court. Unlike the Indian and Pakistani Supreme Courts, which interpreted constitutional consultation (mentioned in Articles 124(2) and 217(2) of the 1949 Indian Constitution and Articles 177 and 193 of the 1973 Pakistani Constitution) in *S.P. Gupta v Union of India*⁴⁹¹, *Supreme Court Advocates-on Record Assn v Union of India*⁴⁹², *Special Reference No. 1 of 1998*⁴⁹³ and *Al-Jihad Trust v Federation of Pakistan*⁴⁹⁴ respectively, the Supreme Court of

⁴⁸⁹ Supra note 472.

⁴⁹⁰ (1998) 7 SCC 739.

⁴⁹¹ (1981) Supp SCC 87.

⁴⁹² Supra note 472.

⁴⁹³ Supra note 490.

⁴⁹⁴ PLD 1996 SC 324.

Bangladesh has interpreted consultation which is no longer a star of the Constitution of Bangladesh. Accordingly, on appeal in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocates and others*⁴⁹⁵, Justice Joynul Abedin of the Appellate Division of the Supreme Court of Bangladesh has rightly struck down those norms as they have not been deduced on construction of the provisions of Articles 95 and 98 of the Constitution. As he observed that:

The learned Judges of the Special Bench have laid down as many as 12 norms or guidelines describing them as conclusions for appointment and non-appointment of Judges to the Supreme Court. These are guidelines in the guise of norms intended to be followed as legal principles by the Government for making appointment. But these norms or guidelines cannot partake the character of law as they are not discernible within the parameter of the Constitution. It would therefore be hazardous to lay down any such guidelines in this behalf as they are hit by Article 65 of the Constitution inasmuch as these guidelines are not deduced on construction of the relevant provisions of the Constitution, namely Articles 95 and 98. It would also not be wise to attempt laying down guidelines on one's impressions about the working of the selection and appointment process. These norms are therefore disapproved and struck-down as erratic and illegal being contrary to the scheme of the Constitution.⁴⁹⁶

Another Judge, Justice Abdul Matin, who delivered the main judgment of the Court, also did not approve norms (i) and (iii) to (xi) (relating to the procedure of appointment of judges), Norm (ii), which provided that 'the opinion of the Chief Justice of Bangladesh in the matter of appointment of judges to the Supreme Court is entitled to have primacy', was approved 'with modification that the opinion of the executive will have dominance in the matter of

⁴⁹⁵ Supra note 482.

⁴⁹⁶ Ibid., at para 92.

antecedent of the candidate only.⁴⁹⁷ The short order of the Court (passed on 2 March 2009) elaborates the matter thus:

In the matter of selection of the Judges the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment and in the area of antecedents the opinion of the executive should be dominant. Together, the two should function to find out the most suitable candidates available for appointment through a transparent process of consultation.⁴⁹⁸

Maintaining that the convention of consultation with the Chief Justice for appointment of judges in the superior judiciary 'has been fairly engrained in Articles 95 and 98 of the Bangladesh Constitution'⁴⁹⁹, and 'should be taken to be imperative'⁵⁰⁰ Justice Md. Joynul Abedin shed further light on the nature, significance and object of consultation with the Chief Justice thus:

.... the President.... and the Chief Justice of Bangladesh shall have full and conclusive deliberation as to the qualification of a candidate for judgeship to the superior Judiciary....they may consult each other by correspondence or by sitting across the table.... The Chief Justice is the most competent person to evaluate the merit and efficiency of a person recommended for the judgeship. The President namely the executive is the proper authority who through the executive agency available to him may be able to report about the local position of the person proposed for judgeship, his character and integrity, his affiliations and the like which have a considerable bearing on the working of a person proposed for appointment as a Judge. It cannot be said that the Chief Justice has been given any position of primacy or supremacy between him and the President. Though the opinion of the Chief Justice as *paterfamilias*, head

⁴⁹⁷ Ibid. at para 269. It should be pointed out that legal norms are not legal principles; they do not bind anybody unless declared law by the court and direction is given by the Court to obey them.

⁴⁹⁸ Ibid. at para 270.

⁴⁹⁹ Ibid. at para 71.

⁵⁰⁰ Ibid. at para 72.

of the Judiciary, is entitled to great respect and weight the President is not bound by the opinion of the Chief Justice.⁵⁰¹

Thus the short order of the Supreme Court and the observation of Justice Md. Joynul Abedin have given the conventional courtesy of consultation with the Chief Justice an appropriate and apposite interpretation following the decision of the Pakistan Supreme Court in *Al-Jihad Trust's Case*⁵⁰²; the President is not bound to act according to the views of the Chief Justice. That does not mean his opinion, articulated as the 'most competent and well equipped' person, can be brushed aside as a hollow formality. The Chief Justice's opinion is entitled to carry great weight. As the Supreme Court's short order of 2 March 2009 given in the case of *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocates and others*⁵⁰³, speaks of according the opinion of the Chief Justice due weightage in the area of legal acumen and suitability and of the President in the area of antecedents. Thus a consensus oriented decision is to be arrived at so that 'the most suitable candidates available' could be found for appointment as Judges of the Supreme Court of Bangladesh. This interpretation of consultation, by not replacing it with 'concurrence' or 'consent', can be considered as a fair and balanced interpretation of the word in view of the fact that the words 'concurrence' and 'consent' were known to the Constitution-makers when they deliberately preferred to use the word 'consultation' to them in original Article 95(1) and 98 of the 1972 Constitution of Bangladesh. For, they did not intend to vest in the Chief Justice of Bangladesh the power of having the final say regarding the matter of judicial appointment.

As to Norm iii which deals with the formation of opinion by the Chief Justice of Bangladesh regarding the matter of appointment of judges of the Supreme Court in consultation with a 'collegium', Chief Justice M.M. Ruhul Amin rightly disagreed with such a concept thus:

⁵⁰¹ Ibid. at paras 72, 74 and 75.

⁵⁰² Supra note 494.

⁵⁰³ Supra note 482.

We did not agree with the learned Judges of the High Court Division that there should be a collegium of Judges and the Chief Justice of Bangladesh will consult with them when he recommends the candidates for appointment as Judges.... [But] there is also no bar for the Chief Justice to discuss with his colleagues who are best persons to adjudge the legal acumen of the persons for appointment as Judges and in fact the Chief Justice discusses with his colleagues before he recommends the names of the candidates for appointment as Judges.⁵⁰⁴

But Justice Matin took a pragmatic and realistic approach in disapproving the concept of collegium by making reference to its non-existence in the Constitution or convention and to the non-satisfactory functioning of the collegium system in India established through a Supreme Court's opinion proffered in *Special Reference No. 1 of 1998*⁵⁰⁵ (the Third Judges' Case). As he held:

.... the concept of collegium is neither in our Constitution nor it has developed as a convention. If there is really any wisdom in the concept of collegium, that can be provided for only by Constitutional reform and not otherwise. Foreign system can advise but cannot command.⁵⁰⁶

Moreover this system is not working in India which is evident from the report of the Law Commission of India.... (Report No. 214 dated 21.11.2008).⁵⁰⁷

Thus the Supreme Court of Bangladesh followed the footmark of the Pakistani Supreme Court which in *Al-Jihad Trust's Case*⁵⁰⁸ did not hold that the opinion of the Chief Justice in the matter of appointment of judges to the Supreme Court could not be merely his individual opinion rather it was to be formed in consultation with the collegium of certain number of senior most judges of the Court. Nevertheless, although the President of Bangladesh, as a

⁵⁰⁴ Ibid. at para 10.

⁵⁰⁵ Supra note 490.

⁵⁰⁶ Supra note 498, at para 264.

⁵⁰⁷ Ibid. at para 235.

⁵⁰⁸ Supra note 494.

Constitutional head under the existing parliamentary form of democracy, is required under Article 48(3) of the Constitution to perform his functions 'in accordance with the advice of the Prime Minister' and (unlike India) under Article 55(2) of the Constitution the executive power of the Republic is vested in the Prime Minister, it has been held in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocates and others*⁵⁰⁹ that the Prime Minister cannot advise the President contrary to the opinion of the Chief Justice in the matter of appointment of judges to the Supreme Court (as the independence of Judiciary is a basic structure of the Constitution). As Justice Matin observed:

We find no existing provision of the Constitution either in Articles 98 or 95 of the Constitution or any other provision which prohibits consultation with the Chief Justice. Therefore consultation with the Chief Justice and primacy is in no way in conflict with Article 48(3) of the constitution. The Prime Minister in view of Article 48(3) and 55(2) cannot advise contrary to the basic feature of the constitution so as to destroy or demolish the independence of judiciary. Therefore the advice of the Prime Minister is subject to the other provision of the Constitution that is Articles 95, 98, 116 of the constitution.⁵¹⁰

Chief Justice M.M. Ruhul Amin and Justice Md. Tafazzul Islam almost echoed the views of Justice Abdul Matin; as both of them observed that the Prime Minister cannot advise contrary to the basic feature of the Constitution.⁵¹¹ Thus unlike the case of *Supreme Court Advocates-*

⁵⁰⁹ Supra note 482.

⁵¹⁰ Ibid. at para 162.

⁵¹¹ As Chief Justice M.M. Ruhul Amin observed: 'Since in Articles 98 or 95 or other provisions of the Constitution, there is no prohibition in respect of consultation with the Chief Justice, and such consultation with the Chief Justice and its primacy being not in contrast with the provisions of Articles 48(3) and 55(2), the Prime Minister cannot advise contrary to the basic feature of the Constitution. Therefore, it appears that the independence of Judiciary being a basic structure of our Constitution, consultation with the Chief Justice in the matter of appointment of Judges with its primacy is an essential part of the independence of Judiciary.' Ibid. at para 9.

Justice Md. Tafazzul Islam held that 'accordingly the Prime Minister, on the basis of Articles 48 (3) and 55(2) of the Constitution, cannot advise contrary to the basic feature of the Constitution so as to destroy or demolish the independence of judiciary and as such consultation with the Chief Justice with primacy of his opinion is an

on *Record Association v Union of India*⁵¹², in which it was observed that the President in appointing judges of the Superior Courts is not required to act on the advice of the Council of Minister (Justice Tandon)⁵¹³ the Council of Minister would be bound by the opinion of the Chief Justice of India (Justice Verma)⁵¹⁴, the above three Judges of the Bangladesh Supreme Court have placed limitation on the exercise of the Prime Minister's- on whom, not on the President, the executive power of the Republic is vested- exclusive and unfettered power of advising the President regarding the appointment of regular judges and additional judges to the Supreme Court. It is difficult to agree with Justice Matin's assertion that 'the advice of the Prime Minister is subject to the other provision of the Constitution that is Articles 95, 98, 116 of the Constitution', when there is no such explicit or implicit provision in the Constitution. It is clear why the learned Justice has referred to Article 116, after Articles 95 and 98, which speaks of the President's power to control and discipline the subordinate judicial officers and magistrates exercising judicial functions in consultation with the Supreme Court, not with the President's power of appointing judges to the Supreme Court. However, to deprive the Prime Minister from the right of advising the President contrary to the opinion of the Chief Justice concerning suitability of candidates for judgeship does not at all fit in with the present constitutional scheme particularly when there is no mention of consultation with the Chief Justice in amended Articles 95 and 98 of the Constitution in the context of appointing regular and additional judges of the Supreme Court. The consultation with the Chief Justice in the matter of appointment of judges under Articles 95 and 98 of the Constitution is presently a mere convention, to use the language of Justice Abdul Matin, 'matured into a rule of law having been recognized and acted upon by all the "actors" in the

integral part of independence of judiciary which is ingrained in the very concept of the independence of judiciary embedded in the principle of Rule of Law.' Ibid. at para 34.

⁵¹² Supra note 472.

⁵¹³ Ibid. at p. 564.

⁵¹⁴ Ibid. at p. 695.

matter.⁵¹⁵ It is pertinent to mention here that, if the opinion given by the Appellate Division of the Supreme Court 'after such hearing as it thinks fit' on a question of law having public importance under Article 106 of the Constitution of Bangladesh does not have binding force on the President, it can strongly be argued that the individual opinion given by the Chief Justice in pursuance of conventional consultation with him regarding the fitness of candidates for appointing as judges to the Supreme Court cannot have primacy in the sense that the Prime Minister cannot advise contrary to his (the Chief Justice's opinion) opinion.

Therefore, it may respectfully be submitted that however convincing it may sound about the necessity of an independent judiciary, a basic structure of the 1972 Constitution of Bangladesh, manned by right type of persons who would dispense justice without fear or favour, ill will or affection, the imposition of limitation on the Prime Minister's power of advising the President under Article 48(3) regarding appointment of judges by way of judicial construction cannot be accepted as a just and fair interpretation. For, neither the Chief Justice nor the Supreme Court has been empowered by the Constitution to appoint judges of the apex court or to advise the President in the exercise of his power. In the interpretation of the conventional consultation with the Chief Justice by the President vis-a-vis the Prime Minister's power (under Article 48(3)) of advising the President, the judges should have been more careful, restrain and objective in observing that the Prime Minister cannot advise the President contrary to the Chief Justice's opinion in the matter of appointments to the Supreme Court. It is widely believed that many things which are not written in the Constitution or deliberately deleted from the Constitution can be interpreted to read into it by means of convenient judicial construction particularly if the matter relates to the powers of the judiciary as the judges have the sole power to interpret the constitution; no formal

⁵¹⁵ Supra note 482 at para 269.

amendment of the Constitution is required. Thus what judges have wrought is a *coup d'état*, slow-moving and genteel, but a *coup d'état* nonetheless. In this context, the timeless and unfading remarks of the US Supreme Court Judge Benjamin N. Cardozo are worth quoting:

Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. None the less, by the abuse of power, they violate the law.⁵¹⁶

However, keeping in mind the manner in which the Constitutional head is required to exercise his powers conferred on him either by the Constitution or law, only Justice Joynul Abedin kept himself within constitutional bounds and exercised judicial restraint when he held that the President is required to exercise his power of appointment of judges to the Supreme Court under Articles 95 and 98 of the Constitution on the advice of the Prime Minister (under Article 48(3)) after a full and effective consultation with the Chief Justice, but the President is not bound by his (the Chief Justice) opinion. As he held:

The power or the act of an appointment of a Judge to the Supreme Court under Articles 95 and 98 of the Constitution is an executive power or act vesting in the President. The President is bound to act in this regard on the aid and advice of the Prime Minister or for that matter the Council of Ministers. In other words, the President shall exercise this power of appointment under Articles 95 and 98 subject to Article 48(3) of the Constitution. The appointment of Judges to the Supreme Court is made by the President in consultation with the Chief Justice subject to the aid and advice of the Prime Minister making the appointment as one with the sanction of the people inasmuch as the Council of Ministers represent the people in a

⁵¹⁶ Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at pp 129, 135.

Parliamentary form of Government. To hold otherwise would amount to rewriting the Constitution and is therefore not acceptable.⁵¹⁷

Justice Joynul Abedin further added that:

There should not be any apprehension that merely because the power of appointment is with the President meaning the executive, the independence of judiciary would become impaired.

The true principle is that after such appointment the executive should have no scope for interference with the work of the Judge or for that matter judiciary.⁵¹⁸

B. Supreme Judicial Commission of Bangladesh

B.1. Background

The 1972 Constitution of Bangladesh provided that the judges of the Supreme Court 'shall be appointed by the President, in consultation with the Chief Justice.' For, the Chief Justice of Bangladesh was in a better position to know about the competence, legal practice, seniority and integrity of the members of the bar and bench. The consultation with the Chief Justice in the selection of other judges was, indeed, a major safeguard against political and expedient appointments. The Chief Justice could reasonably be expected not to be guided by any parochial considerations and, as such, would nominate objectively names of such advocates or judicial officers who would be most suitable for appointment as judges of the Supreme Court. But the Constitution (Fourth Amendment) Act, passed on 25 January 1975, dispensed with President's obligation to consult the Chief Justice in appointing puisne judges of the Supreme Court. This left the door wide open for the President to measure fitness in terms of political eminence rather than judicial quality. But the first Martial Law Regime of Bangladesh restored on 28 May 1976 the Constitutional provision of consultation with the Chief Justice by the President in making appointment of the judges of the Supreme Court.

⁵¹⁷ Ibid. at para 76.

⁵¹⁸ Ibid. at para 77.

The President's obligation to consult the Chief Justice in appointing the judges of the Supreme Court was again dispensed with on 27 November 1977 by the new President and Chief Martial Law Administrator Major General Ziaur Rahman. However, it is claimed that he himself developed the convention of consulting the Chief Justice of Bangladesh in appointing the puisne judges of the Supreme Court.⁵¹⁹ Thus the power to appoint the judges of the Supreme Court is an executive power vested in the President who is duty bound, as a constitutional head, to exercise this power under Article 48(3) 'in accordance with the advice of the Prime Minister' after consulting the Chief Justice of Bangladesh.

Since the number of judges to be appointed in the High Court Division and Appellate Division of the Supreme Court of Bangladesh has been kept indeterminate⁵²⁰, it is to be determined by the President on the advice of the Prime Minister. Although the Appellate Division of the Supreme Court has the strength of judges determined by the President from time to time, there is no such strength for the High Court Division fixed by the President. Thus the number of judges varies at the pleasure of the executive. If the President is satisfied that the number of judges of a Division should for the time being be increased then the President may under Article 98 of the Constitution appoint Additional Judges to the said Division for a period of two years. The successive governments have taken advantage of this lacuna to pack the Supreme Court with judges of political allegiance with the hope that they would support their action, omission and legislation if challenged. When the Government of Awami League succeeded the Bangladesh Nationalist Party Government in 1996, there were 37 judges in the High Court Division and five judges in the Appellate Division including the Chief Justice of Bangladesh. During their five year rule, the number of judges in the High Court Division was increased from 37 to 56 although the number of judges in the Appellate

⁵¹⁹ Supra note 381.

⁵²⁰ As Article 94(2) of the Constitution of Bangladesh provides that the Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Bangladesh, and such number of other Judges as the President may deem it necessary to appoint to each division.

Division remained the same. The Awami League Government altogether appointed 40 additional judges to the High Court Division.⁵²¹ In October 2001, the Bangladesh Nationalist Party came to power and next year it raised the number of judges in the Appellate Division from five to seven (on 9 July 2009, President Zillur Rahman raised the number of posts of Judges in the Appellate Division of the Supreme Court from seven to 11 under Article 94(2) of the Constitution⁵²²). When the BNP Government relinquished power in October 2006 the number of judges in the High Court Division was 72 and it appointed altogether 45 judges.⁵²³ In order to prevent politically motivated appointments that took place allegedly during the previous two regimes and 'to select and recommend competent persons for appointment as judges of the Supreme Court',⁵²⁴ the President Iajuddin Ahmad on 16 March 2008 issued the Supreme Judicial Commission Ordinance providing for the establishment of a Supreme Judicial Commission for selection and recommendation of names to the President for appointment as additional judges and regular judges of the High Court Division and judges of the Appellate Division of the Supreme Court. The Ordinance was issued during the regime of the Non-Party Care-taker Government (consisting of the Chief Advisor and ten other nominated Advisors) which is an interim government established within 15 days of dissolution of the Parliament⁵²⁵ that have only the mandate to carry on ordinarily the routine functions of the government and is destined to 'give to Election Commission all possible aid

⁵²¹ Staff Correspondent, 'HC verdict on judges' appointment stayed for three weeks', *New Age*, 30 July 2008 < <http://newagebd.com/2008/jul/30/front.html#12>> (accessed on 10 December 2010).

⁵²² Ashutosh Sarkar, 'Appellate Division: Number of posts of judges raised to 11', *The Daily Star*, 10 July 2009 < <http://www.thedailystar.net/story.php?nid=96265>> (accessed on 10 December 2010).

⁵²³ Staff Correspondent, '10 new HC judges to be appointed', 31 October 2008 < <http://www.thedailystar.net/newDesign/news-details.php?nid=61184>> (accessed on 10 December 2010). After 2004, the B.N.P Government did not appoint any additional judges to the High Court Division.

⁵²⁴ First preambular paragraph to the Supreme Judicial Commission Ordinance, 2008.

⁵²⁵ Article 58C(2), the Constitution of the People's Republic of Bangladesh, 1972.

and assistance for holding the general elections of members of parliament peacefully, fairly and impartially.⁵²⁶

B.2. Composition of the Supreme Judicial Commission

The original Supreme Judicial Commission Ordinance, 2008, issued in March (2008) provided that the Commission would consist of nine members with the Chief Justice as its Chairman and the Minister of Law, Justice and Parliamentary Affairs, two senior most judges of the Appellate Division, Attorney General, two Members of Parliament- one should be nominated by the Leader of the House and the other by the Leader of the Opposition in Parliament-, President of the Supreme Court Bar Association and Secretary, Ministry of Law, Justice and Parliamentary Affairs as the members of the Commission.⁵²⁷ Thus among the members of the Commission three were judicial members (including the Chief Justice) while the non-judicial members, six in number, made up the majority. Since the Commission was established for a cautious, informed, professional and non-political search for the best persons for the judgeship of the Supreme Court, based on first-hand professional knowledge of each of the candidate's knowledge of law, balanced mind, integrity and suitability of character and temperament as an advocate and a judicial officer, the provisions for inclusion into it two members of a political body like the Parliament, and Minister (a politician) and Secretary (a loyal civil servant) of the Ministry of Law, Justice and Parliamentary Affairs as its members could hardly serve the purpose of selecting and recommending for appointment as judges of the Supreme Court the best potential candidate for maintaining the quality of the Bench. Although both the President of the Supreme Court Bar Association and the Attorney General (principal and Constitutional Law Officer of the Government) are preeminently suited to evaluate the advocates of the Supreme Court for appointment as judges, their inclusion into

⁵²⁶ Article 58D (2), *ibid*.

⁵²⁷ Section 3(2), the Supreme Judicial Commission Ordinance, 2008.

the Commission might not be conducive to check patronage appointment. For, they are under the distressing influence of either party in power or opposition political parties and, as such, are highly politically charged. Furthermore, out of the nine members of the Commission, the provision for including only three judges of the Supreme Court- the Chief Justice and two senior most judges of the Appellate Division- into the Commission evinced the domination of six non-judicial members in the selection process. Since the predominance of the judicial members in the composition of the Supreme Judicial Commission was diluted, the purpose of establishing the Commission for selecting and recommending the most qualified and appropriate persons for appointment as judges of the Supreme Court was destined to be frustrated.

But only three months after the promulgation of the Ordinance, on 16 June 2008, the Supreme Judicial Commission (Amendment) Ordinance, 2008 was issued to introduce changes in the composition of the Commission by which the provision of appointing two members of Parliament (one from the ruling party and other from the opposition) and the Secretary of the Ministry of Law as the Commission's members were deleted and provision was made to include two senior most judges of the High Court Division of the Supreme Court as the members of the Commission. Thus under the new amendment, the Commission would consist of the Chief Justice as its ex-officio Chairman and the Minister of Law, three senior most judges of the Appellate Division (previously it was two), two senior most judges of the High Court Division, Attorney General and the President of the Supreme Court Bar Association, altogether eight, as ex-officio members. Thus unlike Malaysia, the Prime Minister or President of Bangladesh was not given any authority to appoint any imminent person, jurist or supreme court judge, close to the regime, as members of the Commission. It is noticeable that the majority of the members of the Commission- six out of nine- are ex-officio members of the Commission from the Judges of the High Court Division and

Appellate Division of the Supreme Court. Thus the majority judicial members having expert knowledge about the candidate's acumen and suitability dominate the selection process of judges for appointment to the highest judicial office. The other three members- the Law Minister, Attorney General and President of the Supreme Court Bar Association (if the Bar President has political allegiance to the party in power)- could make an abortive attempt in the meeting of the Commission in deference to the wishes of the Prime Minister/President for filling in the vacancies in the Supreme Court. However, the inclusion of the two senior most judges of the High Court Division into the Supreme Judicial Commission may be considered as a positive development in the sense that the large number of lawyers appear before them and only a small fraction of the lawyers having a good length of practice and better reputation and standing (generally not interested to become a judge) appear before the Appellate Division of the Supreme Court.

Unlike the Judicial Appointments Act of Malaysia, 2009, there is no provision in the Supreme Judicial Commission Ordinance, 2008 to fill in casual vacancies as all the members of the Commission were ex-officio members.

B.3. Selection Process

Unlike the Judicial Appointments Commission of Malaysia, the Supreme Judicial Commission of Bangladesh was not given any discretion to advertise in the Commission's website or in any other medium the Commission deems appropriate to fill in any vacancy in the office of a judge of the Supreme Court. Thus any citizen having the experience of practising before the Supreme Court for a period not less than 10 years or a judicial officer having not less than ten years experience could not apply directly for selection as a judge of the High Court Division of the Supreme Court. The Commission was required to consider the

names of the candidates proposed by the Law, Justice and Parliamentary Affairs Ministry.⁵²⁸ The Law Ministry could propose minimum three and maximum five names for each vacancy to the Commission for its consideration to recommend for appointment by the President as additional judges and judges of the High Court Division and the judges of the Appellate Division.⁵²⁹ It is obvious that candidates sharing ideological views of the party in power would have better prospects of getting nomination from the Law, Justice and Parliamentary Affairs Ministry for the consideration of the Supreme Judicial Commission of Bangladesh. However, if the Commission considered it necessary to take into account the names of the additional candidates, it could make such a request to the Law, Justice and Parliamentary Affairs Ministry or it could select any competent person outside the names proposed by the Law, Justice and Parliamentary Ministry.⁵³⁰ Such a candidate, if selected and recommended, would have the least chance of getting appointment for not having political patronage. Thus non-recognition of plurality of sources of proposing candidates from outside the Ministry of Law, Justice and Parliamentary Affairs for judicial appointment was a serious drawback of the system. However, the Supreme Judicial Commission was allowed to follow a transparent process in selecting the candidates by taking interviews of the candidates at its discretion⁵³¹ as against the previous system of appointing judges of the Supreme Court which was cloaked with secrecy and devoid of any transparency. But unlike the Malaysian Judicial Appointments Commission Act, the Supreme Judicial Commission Ordinance of Bangladesh did not contain any provision as to screening of the antecedents of the candidates by the Independent Anti-Corruption Commission, Police Forces or Tax Ombudsman of Bangladesh in respect of their educational qualification, tax payment record, credit history as to arrest and conviction, integrity etc.

⁵²⁸ Section 6(1), *ibid.*

⁵²⁹ Section 6(2), *ibid.*

⁵³⁰ Section 6(3), *ibid.*

⁵³¹ Section 5(7), *ibid.*

B.4. Functions and Selection Criteria

The authority of the Commission was confined only to select and recommend candidates for appointment as regular and additional judges of the High Court Division and of regular judges of the Appellate Division of the Supreme Court. But unlike the Judicial Appointments Commission of Malaysia, it was not given the jurisdiction to recommend candidates for appointment as the Chief Justice of Bangladesh. It was also not given any authority to discuss about the disposal of cases and improving the performance of the Supreme Court Judges. The Supreme Judicial Commission Ordinance has provided for different sets of criteria for the consideration of candidate's by the Commission for the appointment of additional judges in the High Court Division and Judges in the Appellate Division of the Supreme Court. The Commission was required to consider the candidates educational qualifications, professional skills (efficiency), seniority, honesty and reputation (along with other ancillary matters) in recommending for the appointment as additional judges of the High Court Division.⁵³² On other hand, for recommending any judge of the High Court Division of the Supreme Court for appointment to the Appellate Division, his seniority, judicial skill, integrity and reputation (along with other subsidiary matters) were to be taken into account by the Commission.⁵³³

B.5. Selection Meeting of the Commission

The Supreme Judicial Commission of Bangladesh was required to sit at least once in six months.⁵³⁴ But the Chairman of the Supreme Judicial Commission, the Chief Justice, would immediately convene the meeting of the Commission if he was requested to do so for selecting and recommending the names by the President or by the competent authority (i.e. Ministry of Law, Justice and Parliamentary Affairs under the Rules of Business) for the

⁵³² Section 5(6), *ibid.*

⁵³³ Section 5(5), *ibid.*

⁵³⁴ Section 4(5), *ibid.*

appointment of judges of the Supreme Court.⁵³⁵ It was stressed that the Commission first would strive at to take a unanimous decision, perhaps taking into account the importance of appointing the most qualified and suitable persons as judges, for maintaining the quality of the Bench. If that was not possible the decision was to be taken by a majority of the members present.⁵³⁶ The presence of five members out of nine would constitute quorum of the meeting and a decision to recommend names for appointment could be taken by a majority of the members present which implied that a decision of the Commission might be taken by the support of three members if only five members attended the meeting.⁵³⁷ Unlike the Malaysian Judicial Appointments Commission, it did not say that the quorum would include the Chairman. But like the Malaysian Judicial Appointments Commission, it was provided that when there was an equality of votes, the Chairman of the Commission or the person presiding over the meeting could exercise a casting vote.⁵³⁸ It is to be stressed here that the three non-judicial members of the Commission (the Law Minister, Attorney General and President of the Supreme Court Bar Association) were allowed to attend its meeting as members of the Commission for selecting and recommending the High Court Division judges for appointment to the vacant posts in the Appellate Division. But the senior most judges of the High Court Division as the Members of the Commission were precluded from taking part in its meeting without assigning any reason whatsoever (for example, if he was being considered for selection).⁵³⁹ However, the Commission was required to select and recommend two candidates for each vacancy of the Supreme Court judge (that was the usual practice) without the requirement of any mention of the order of preference.⁵⁴⁰

⁵³⁵ Section 4(6), *ibid.*

⁵³⁶ Section 4(7), *ibid.*

⁵³⁷ Proviso to sub-section (4) to Section 4, *ibid.*

⁵³⁸ *Supra* note 535.

⁵³⁹ Section 4(9), *ibid.* Added by the Supreme Judicial Commission (Amendment) Ordinance, 2008.

⁵⁴⁰ Section 5(2), *ibid.*

B. 6. Consideration of Report by the President

The Supreme Judicial Commission of Bangladesh was required to send its recommendation to the Ministry Law, Justice and Parliamentary Affairs for forwarding it to the President.⁵⁴¹ Ordinarily the President would appoint the judges of the Supreme Court in accordance with the recommendation of the Commission.⁵⁴² In case of differing with the recommendation of the Commission, the President would send the recommendation back to the Commission for its reconsideration.⁵⁴³ After receipt of any request from the President for reviewing any recommendation, the Commission would promptly reconsider the recommendation and would send either its modified recommendation or earlier recommendation with recorded reasonable grounds to the President.⁵⁴⁴ The President was given the right to ignore and reject the recommendation of the Commission by recording appropriate reasons.⁵⁴⁵

Thus the power of the President to accept and reject the candidates recommended by the Commission at his pleasure defeated the very objective of establishing the Commission for appointing persons of highest caliber, character, professional skill and integrity as judges (i.e. right type of judges) to the Supreme Court.

B.7. Whether the Supreme Judicial Commission Ordinance was a Valid Piece of Legislation?

The Ordinance making power of the President of Bangladesh, conferred on him by Article 93 of the Constitution as a legislative function, is a relic of the Government of India Act, 1935⁵⁴⁶ which is of the nature of an emergency power, to meet 'circumstances' that 'render

⁵⁴¹ Section 7, *ibid.*

⁵⁴² Section 9(1), *ibid.*

⁵⁴³ Section 9(2), *ibid.*

⁵⁴⁴ Section 9(3), *ibid.*

⁵⁴⁵ Section 9(4), *ibid.*

⁵⁴⁶ Section 42, the Government of India Act, 1935.

immediate action necessary' when 'Parliament stands dissolved or is not in session'⁵⁴⁷ to secure the enactment of necessary legislation instantly. Apart from time and circumstances, there are other limitations on the ordinance making power of the President who is the sole judge of the necessity of issuing an ordinance (as Article 93 contains the words 'if the President is satisfied'); he cannot promulgate an ordinance making any provision i) which could not lawfully be made under this [the Bangladesh] Constitution by Act of Parliament; ii) for altering or repealing any provision of this Constitution.⁵⁴⁸ Although the ordinance making power of the President should be exercised sparingly, there has always been a tendency on the part of the successive Governments to resort to such a power frequently than seems necessary and desirable. However, the Supreme Judicial Commission Ordinance was issued in March 2008 during the regime of the third Non-Party Care-taker Government established after the dissolution of the Parliament in 2007 as a stopgap arrangement for holding free and fair General Elections. This Government was required to discharge its function as an interim government and, as such, to carry on routine day to day works of the Government in addition to their main function of assisting and aiding the Election Commission. Hence it could not make any policy decision except in the case of necessity for the discharge of such routine functions.⁵⁴⁹ The promulgation of the Supreme Judicial Commission Ordinance cannot be accepted as a valid piece of legislation within the framework of the Constitution due to the following grounds:

Unlike Article 115 of the Constitution of Bangladesh, which empowers the President to make rules in accordance with which he is required to exercise his power of appointing subordinate judicial officers and magistrates exercising judicial functions, Articles 95(1) and 98 (which deal with appointment of regular and additional judges of the Supreme Court respectively) do

⁵⁴⁷ Article 93(1), the Constitution of the People's Republic of Bangladesh, 1972.

⁵⁴⁸ Proviso to Article 93(1), *ibid*.

⁵⁴⁹ Article 58D (1), *ibid*.

not at all provide for the enactment of any law setting up a mechanism like the Supreme Judicial Commission for selecting candidates in the matter of appointment of judges to the Supreme Court by the President. Unlike the Constitutions of Algeria, France, Italy, Namibia, Sudan and Rwanda,⁵⁵⁰ the Constitution of Bangladesh even does not empower the legislative authorities to enact law/promulgate ordinance regulating the organisation, powers and functioning of the Commission. Article 95(2)(c) of the Constitution of Bangladesh empowers the Parliament only to pass law providing for an alternative requisite qualification (e.g. a distinguished jurist) for the appointment of judges to the Supreme Court and, as such, an ordinance if at all necessary, could only be promulgated in this regard. Instead, the Supreme Judicial Commission Ordinance, apart from providing for detailed provisions concerning the composition, functions and procedure of the Commission, laid down different selection criteria (educational qualification, professional skill, seniority, honesty and reputation for High Court Division judgeship and seniority, judicial skill, integrity and reputation for Appellate Division judgeship) for the appointment of the High Court Division as well as the Appellate Division Judges. Therefore, it can be argued that the Supreme Judicial Commission Ordinance, 2008, providing for the establishment of a Supreme Judicial Commission, was not promulgated within the parameters of Articles 95, 98 and 65⁵⁵¹ of the Constitution of Bangladesh and, as such, is ultra vires of the Constitution of Bangladesh.

⁵⁵⁰ Article 155 of the Constitution of Algeria, 1989, provides that 'The High Council Magistracy decides, within the conditions defined by the law, the appointment, transfer and the progress of the magistrate's careers.' Article 65 of the Constitution of France states that 'An institutional Act shall determine the member in which this article [dealing with the jurisdiction and powers of the High Council of the Judiciary concerning appointment and disciplining the judges and public prosecutors] is to be implemented.' Article 105 of the Constitution of Italy, 1947, lays down that 'The superior council of the judiciary, as defined by organizational law, has the exclusive competence to appoint, assign, move, promote and discipline members of the judiciary.' Article 102(2) of the Constitution of Sudan, 1998, provides that 'The Judiciary shall have a council to be known as the "the Supreme Council of the Judiciary", its composition and functions shall be prescribed by law.' Article 158 of the Constitution of Rwanda, 2003 stipulates that 'An organic law shall determine the organization, powers and functioning of the Supreme Council of the Judiciary.'

⁵⁵¹ Article 65(1) provides that 'There shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic.'

B. 8. Functioning of the Supreme Judicial Commission

However, for the first time in the history of Bangladesh the President on 12 November 2008 appointed the seven new additional judges to the High Court Division for two years on the recommendation of the Supreme Judicial Commission⁵⁵² of which one regretted to accept the offer of judgeship due to his ill-health. The Commission also recommended in its first meeting, held on 16 October 2008, four senior most judges of the High Court Division for the two vacant posts of the Appellate Division.⁵⁵³

B.9. Natural Death of the Supreme Judicial Commission

It is ironical that Bangladesh Awami Lawyers Association, a platform of pro-Awami League lawyers, demanded on 26 July 2008 the repeal of the Supreme Judicial Commission Ordinance, 2008.⁵⁵⁴ After coming to power by obtaining a landslide victory in the General Elections, held on 29 December 2008, the Awami League placed 54 out of 122 Ordinances promulgated by the Non- Party Caretaker Government for the approval of the Parliament. But, as expected, the Supreme Judicial Commission Ordinance was not placed before the newly elected House of the Nation (the Parliament) for its passing into law. Therefore it met a natural death⁵⁵⁵ as the life of an ordinance is always subject to the approval of the Parliament. Since it is the same political party which deleted from the Constitution on 25 January 1975 the provision concerning consultation with the Chief Justice by the President in appointing judges of the Supreme Court and, as such, it is quite natural that it cannot afford to

⁵⁵² Ashutosh Sarkar, 'Appellate Division running with few judges for long', *The Daily Star*, 18 December 2008, 1.

⁵⁵³ Ibid.

⁵⁵⁴ Staff Correspondent, 'No UZ elections before JS polls: AL Awami Ainjibi Parishad to form human chains Aug 7', *The Daily Star*, 27 July 2008 < <http://www.thedailystar.net/story.php?nid=47643> > (accessed on 10 December 2010).

⁵⁵⁵ Rakib Hasnet Suman, 'Public interest ignored in picking CG's ordinances', *The Daily Star*, 24 February 2009, 1.

Chapter IV:

Comparative Study of the Methods of Appointment of Superior Court Judges in Malaysia and Bangladesh

As common law countries, both Malaysia and Bangladesh have adopted the method of appointing judges of superior courts by the Heads of the State, following the British practice obtaining prior to the enactment of the Constitution Reform Act, 2005, with striking variations regarding consulting and recommending entities in order to minimise intrusion of politics in the appointment process. There is no dispute about the fact that the appointment of judges as contemplated in the Constitutions of both the countries is an executive act. For, the final order of appointment is passed in the name of the Head of the State and consequently notification is to be issued under the law and Rules of Business. However, on the basis of discussion made in Chapters II and III, the following comparison can be drawn between the methods of appointment of superior court judges in Malaysia and Bangladesh:

A. Method of Appointment of the Chief Justice

The Constitution of the Federation of Malaya, 1957 empowered the Head of the State- the Constitutional Monarch Yang di-Pertuan Agong- to appoint in his discretion the Chief Justice of the Supreme Court only after consulting the Conference of Rulers (consisting of nine Rulers-monarchical heads of the component States of the Federation of Malaysia and four Governors) and considering the advice of the Prime Minister. But the Constitution Amendment Act, 1960, passed within three years of the coming into effect of the Constitution, took away the discretionary power of the Yang di-Pertuan Agong to appoint the Chief Justice of the Supreme Court after consulting the Conference of Rulers and considering the advice of the Prime Minister. Under the new arrangement, the Yang di-Pertuan Agong was required to act on the advice of the Prime Minister (thus the real authority passed from

the Head of the State to the Head of the Government) in appointing the Chief Justice after consulting the Conference of Rulers. The Constitution (Amendment) Act, 1963, as amended in 1965 and 1994, retained the same method of appointing the Chief Justice of Malaysia, the head of the Federal Court and paterfamilias of the judicial fraternity. The Chief Justice of the Federal Court shall be appointed by the Yang di-Pertuan Agong 'acting on the advice of the Prime Minister, after consulting the Conference of Rulers.'⁵⁵⁶ The Judicial Appointments Commission Act, 2009, which provides for the establishment of a Judicial Appointments Commission as a step forward to 'improve the process of appointing judges', empowers the Commission, *inter alia*, to evaluate and vet right candidates for recommending to the Prime Minister for consulting the Conference of Rulers before putting forward their names to the Yang di-Pertuan Agong for appointment as the Chief Justice of Malaysia.

On the other hand, the 1972 Constitution of Bangladesh originally empowered the President to appoint the Chief Justice of Bangladesh without consulting any other designated Constitutional functionary except to act under Article 48(3) as a Constitutional Head, 'in accordance with the advice of the Prime Minister.' But unlike Malaysia, the Constitution (Twelfth Amendment) Act, 1991, passed unanimously by the Parliament of Bangladesh (an unprecedented event in the history of Bangladesh) for referring the matter to the referendum, freed the President even from the obligation of consulting the Prime Minister in appointing the Chief Justice of Bangladesh. Furthermore, unlike the Malaysian Judicial Appointments Commission, the Supreme Judicial Commission of Bangladesh established in March 2008

⁵⁵⁶ But the Federal Constitution of Malaysia, 1963 provides for further consultation with other functionaries by the Prime Minister in giving advice to the Head of the State for the appointment of the heads of the two other superior courts- the President of the Court of Appeal and the two Chief Judges of the High Courts. The Prime Minister is additionally required to consult the Chief Justice of the Federal Court before tendering his advice to the Yang di-Pertuan Agong for appointing a Federal Court Judge to the post of the President of the Court of Appeal. In appointing the Chief Justice of the High Court of Malaya, he is, in addition, needed not only to consult the Chief Justice of the Federal Court but also to consult the Chief Judge of Sabah and Sarawak and vice versa. But if the appointment is for the post of the Chief Judge of Sabah and Sarawak, the Prime Minister is also obligated to consult the Chief Minister of each of the States of Sabah and Sarawak.

under a Presidential Ordinance and met natural death in early 2009 as it was not placed before the Parliament for its approval, was not empowered to select and recommend candidates to the President for appointment as the Chief Justice of Bangladesh. Thus the President enjoys unfettered discretion to appoint the Chief Justice of Bangladesh, involving the great risk of intrusion of political consideration into the appointment process.

B. Method of Appointment of the Puisne Judges

The Constitution of the Federation of Malaya, 1957 empowered the Yang di-Pertuan Agong to act, after consulting the Conference of Rulers and considering the advice of the Prime Minister, on the recommendation of the Judicial and Legal Service Commission in appointing the other judges of the Supreme Court. Although the principles on the independence of judiciary (adopted by various international and regional organisations in the 1980s) favour the appointment of judges of superior courts, on the recommendation, proposal or advice of with a representative judicial body⁵⁵⁷ which has thereafter been accepted by many constitutions of the world⁵⁵⁸, the Constitution of the Federation of Malaya, as back as in 1957, used the more weighty word of recommendation (instead of consultation) of the body dominated by the judicial members-the Judicial and Legal Service Commission⁵⁵⁹ in order to ensure the appointment of the most suitable candidates as judges of the Supreme Court. But this provision was abolished three years later on 31 May 1960 when the Constitution (Amendment) Act, 1960 was passed. Under the new arrangement, the Yang di-Pertuan Agong was obligated to act on the advice of the Prime Minister in appointing other judges of

⁵⁵⁷ See Article 3, the Text of the Lagos Conference of the International Commission of Jurists, 1961, Article 10(d), the Principles and Conclusions on the Independence of the Judiciary in the LAWASIA Region, 1982, Article 3(a), the International Bar Association's Minimum Standards of Judicial Independence, 1982, Article 2.14(b), the Universal Declaration on the Independence of Justice, 1983, Article 10, the UN Basic Principles on the Independence of the Judiciary, 1985, Article 14, Beijing Statement of Principles on the Independence of the Judiciary in LAWASIA Region, 1995 and Article II(1), the Latimer House Guidelines for Parliamentary Supremacy and Judicial Independence in the Commonwealth, 1998.

⁵⁵⁸ Ibid.

⁵⁵⁹ The majority of (at least) five members of the Judicial and Legal Service Commission were from the Judges of the Supreme Court including the Chief Justice.

the Supreme Court after consulting the Conference of Rulers and considering the advice of the Chief Justice. Thus the new element of considering the advice of the Chief Justice was introduced replacing the previous arrangement of acting on the recommendation of the Judicial and Legal Service Commission headed by the Chief Justice of Malaysia. But the Constitution (Amendment) Act, 1963 as amended in 1965 and 1994⁵⁶⁰ provides that the other judges of the Federal Court, the Court of Appeal and the High Courts shall be appointed by the Yang di-Pertuan, acting on the advice of the Prime Minister, after consulting the Conference of Rulers. But the Prime Minister is always obligated to consult the Chief Justice of the Federal Court before tendering his advice to the Yang di-Pertuan Agong regarding the appointment of all the judges of the three superior courts- the Federal Court, the Court of Appeal and the two High Courts (the High Court of Malaya and the High Court of Sabah and Sarawak). The Prime Minister has an additional constitutional duty to consult the President of the Court of Appeal in respect of the appointment of the judges to the Court of Appeal before tendering his advice to the Head of the State. He is also enjoined to consult the Chief Judge of the High Court concerned before presenting his advice to the Yang di-Pertuan Agong regarding the appointment of judges to the High Court. Thus after obtaining the opinion of the designated constitutional functionaries, the Prime Minister transmits his advice to the Yang di-Pertuan Agong for the appointment of judges of the three superior courts and the Constitutional Head has no choice but to accept and act on his advice.

On the other hand, like Malaysia, where since 1960 consultation with the Chief Justice of Malaysia has been in existence in respect of the appointment of the puisne judges of the apex court (the Supreme Court/Federal Court), in Bangladesh the 1972 Constitution originally provided for (in Article 95(1)) consultation with the Chief Justice by the President in appointing puisne judges of the High Court Division and Appellate Division of the Supreme

⁵⁶⁰ The Constitution Amendment Act, 1994 renamed the Supreme Court as the Federal Court and the High Courts- the lowest tier of the three tier superior courts.

Court. But the Constitutional provision of consulting the Chief Justice as an essential prerequisite in appointing judges of the Supreme Court was first omitted in January 1975 and then it was restored on 28 May 1976 by the first Martial Law regime (1975-1979). But after only one and a half year, on 27 November 1977, the appointment of judges of the Supreme Court in Bangladesh was again made a matter of pleasure vested in the President freeing him from Constitutional obligation of consulting the Chief Justice. Thus unlike Malaysia, there is no limitation or restriction in Bangladesh on the power of the Head of the State to appoint the judges of the apex court. However, the convention of consulting the Chief Justice in appointing judges of the Supreme Court by the President, as established in 1978 by the then President and Chief Martial Law Administrator Ziaur Rahman, has been in vogue.

C. Judicial Interpretation of Consultation

In Malaysia, the word (Constitutional) 'consultation' was given literal/lexicon meaning in 2002 in *Re Dato' Seri Anwar Ibrahim*⁵⁶¹, the first case in which the Court of Appeal examined in 2002 the Constitutional provisions concerning appointment. As Lamin PCA observed: 'To consult means to refer a matter for advice, opinion or views.... To "consult" does not mean to "consent".... He [the consultant] may consider the advice or opinion given but he is not bound by it.'⁵⁶²

Unlike Malaysia, in Bangladesh conventional consultation with the Chief Justice in appointing judges of the Supreme Court by the President was given to some extent an extended meaning in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocate*.⁵⁶³ As it was held that 'In the matter of selection of the Judges, the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for

⁵⁶¹ [2000] 2 CLJ 570.

⁵⁶² Ibid., at p. 571-b, d, f.

⁵⁶³ 38 CLC (AD) 2009.

the appointment and in the area of antecedents the opinion of the executive should be dominant.⁵⁶⁴

D. Establishment of an Independent Body for Selection and Recommendation of Candidates for Appointment of Judges in the Superior Courts

Keeping the Constitutional selection procedure of appointing judges of the Federal Court, the Court of Appeal and the High Courts untouched, the Parliament of Malaysia passed in December 2008 the Judicial Appointments Commission Act providing for the establishment of a Judicial Appointments Commission. The Commission is comprised of four ex-officio judicial members and five non ex-officio members to be appointed by the Prime Minister, for selecting candidates for the consideration of the Prime Minister in the matter of the appointment of judges including heads of the superior courts.

Unlike Malaysia, the President of Bangladesh, during the regime of third 'Non-Party Care-taker Government set up as an interim Government for about four months mainly to assist the Election Commission in conducting the General Elections in a free, fair and impartial manner, promulgated the Supreme Judicial Commission Ordinance, 2008 providing for the establishment of a Supreme Judicial Commission. Unlike the Malaysian Judicial Appointments Commission, which is nine-member Commission where the non ex-officio members appointed by the Prime Minister are in a majority (i.e. five in number), the Supreme Judicial Commission of Bangladesh was entirely composed of nine ex-officio members and among the ex-officio members six were from the judiciary- the Chief Justice of Bangladesh, the three senior most judges of the Appellate Division and two senior most judges of the High Court Division of the Supreme Court- who did constitute the majority. This domination of the Commission by the judicial members was more conducive to select and recommend

⁵⁶⁴ Ibid. at para 270.

candidates objectively keeping in mind the needs of the office in view. Although the Supreme Judicial Commission was able to recommend the best candidates to the President for appointment of judges of the Supreme Court, unlike the Judicial Appointments Commission of Malaysia it was not empowered to recommend candidates for appointment as the Chief Justice of Bangladesh. However, the recommendations of both the Commissions were not given binding force on the executive taking into account the scheme of the Constitutions and the establishments of the Commissions in both the countries were provided for neither in pursuance of any provision of the Constitutions nor by amending them (the Constitutions). Nevertheless, the Supreme Judicial Commission of Bangladesh has been defunct since February 2009 as the newly elected Government of the Awami League did not place it before the first session of the newly constituted Parliament for its approval.⁵⁶⁵

E. Method of Appointment of Additional Judges and Judicial Commissioners

The Federal Constitution of Malaysia speaks of the appointment of additional judges only in the Federal Court by the Yang di-Pertuan Agong acting solely on the advice of the Chief Justice of Malaysia⁵⁶⁶ (without requiring to follow the normal procedure of appointing regular judges in the Federal Court i.e. to act on the advice of the Prime Minister after consulting the Conference of Rulers) 'for such purposes or for such period of time as' the Head of the State 'may specify.' However, no additional judge has yet been appointed to the Federal Court of Malaysia.

The Federal Constitution of Malaysia, as amended in 1963, provided for the first time the provision for the appointment of judicial commissioners in the High Court of Malaya and the High Court in Sabah and Sarawak. Under the amended method of appointment of judicial

⁵⁶⁵ Rakib Hasnet Suman, 'Public interest ignored in picking CG's ordinances', *The Daily Star*, 24 February 2009, 1.

⁵⁶⁶ Article 122(1A), the Federal Constitution of Malaysia, 1963.

commissioners, brought about 1994, the Yang di- Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may appoint a judicial commissioner 'for such period or such purposes as may be specified in the order.'⁵⁶⁷ Thus unlike the appointment of regular judges of the High Courts, the Prime Minister is neither required to consult the Conference of Rulers nor the Chief Judge of the High Court concerned, who is the most competent person to express his views as to the necessity of appointing judicial commissioners and the suitability of candidates for such an appointment, before tendering his advice to the appointment of judicial Commissioners. Since no express judicial ground (i.e. in order to facilitate the disposal of cases in the Court) is provided for the appointment of judicial commissioners, the arrangement can easily be used for political consideration, i.e. as a reward for those who have rendered services to the party in power. Until August 2010, 68 Judicial Commissioners have been appointed for an initial term of two years⁵⁶⁸, most of whom found berth as permanent judges of the High Courts.⁵⁶⁹

On the other hand, unlike Malaysia, where exist a difference between the method of appointment of regular and additional judges to the Federal Court and between the method of appointment of regular and additional judges (i.e. judicial commissioners) to the High Courts, in Bangladesh the same method of appointment is followed in case of appointing regular and additional judges in the High Court Division of the Supreme Court. Unlike Malaysia, where the Chief Justice of the country is always to be consulted (apart from other constitutional functionaries) as a Constitutional imperative in appointing the judges of the Federal Court, the Court of Appeal and the High Courts, the requirement of consulting the Chief Justice in

⁵⁶⁷ Article 122AB, the Federal Constitution of Malaysia.

⁵⁶⁸ Appointments Summary of the Judicial Appointments Commission until 13 August 2010 < http://translate.google.com.my/translate?hl=en&sl=ms&u=http://www.jac.gov.my/&ei=nyz9TKL1KY_RrQfB5qmZCA&sa=X&oi=translate&ct=result&resnum=1&ved=0CBsQ7gEwAA&prev=/search%3Fq%3Djudicial%2Bappointments%2Bcommission%2Bmalaysia%26hl%3Den%26safe%3Doff%26prmd%3Div> (accessed on 20 November 2010).

⁵⁶⁹ Tun Dato' Seri Abdul Hamid Omar, *The Judiciary in Malaysia* (Kuala Lumpur: Asia Pacific Publications Sdn Bhd, 1994) at p. 81

Bangladesh for the appointment of judges in the Supreme Court has been conventional since 1978. Like the provision for the appointment of judicial commissioners in the two High Courts of Malaysia, the provision for appointment of additional judges in the High Court Division of the Supreme Court of Bangladesh has become a gateway to the cadre of permanent judgeship in the High Court Division under Article 95 of the Constitution as no judge till today has been appointed directly to this Court. Like Malaysia, where some of the judicial commissioners have not been appointed as regular judges of the High Courts, in Bangladesh seven out of 101 additional judges⁵⁷⁰, appointed between 1978 and 1998 and 15 additional judges out of 29⁵⁷¹, appointed between 24 September 1999 and 23 August 2001, were not appointed as regular judges of the High Court Division of the Supreme Court of Bangladesh. Although non-appointment of judicial commissioners as regular judges of the High Courts in Malaysia has never been challenged in the superior courts, non-appointment of 10 additional judges as regular judges of the High Court Division under Article 95 of the Constitution was challenged in Bangladesh. In the Case of *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocates and others*⁵⁷², Justice Md. Abdul Matin observed that the additional judges ‘only have the right to be considered for appointment under Article 95(1) of the Constitution’⁵⁷³ and ‘not beyond.’⁵⁷⁴ In the same case, Justice Md. Joynul Abedin was more categorical about the right of an additional judge to be appointed as a permanent judge of the High Court Division of the Supreme Court when he held:

.... the President appoints an Additional Judge for a period not exceeding two years and such appointment is not dependent on any purpose, such as to cope with any increased number of pending cases. In other words, an Additional Judge is appointed without any kind of

⁵⁷⁰ *Md. Idrisur Rahman, Advocate and others v Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of the People's Republic of Bangladesh*, 37 CLC (HCD) 2008 at para 336.

⁵⁷¹ *Ibid.* at para 154.

⁵⁷² 38 CLC (AD) 2009.

⁵⁷³ *Ibid.* at para 269.

⁵⁷⁴ *Ibid.* at para 238.

assurance or promise that on initial expiry of two years he will be reappointed for a further term or he will be afresh appointed as a permanent Judge. As in the case of initial appointment as Additional Judge under Article 98, so in the case of a fresh appointment after the initial tenure of two years expires, there is no legal right to be appointed nor does non-appointment give rise to any legal or constitutional infirmity so as to be the subject of judicial review.⁵⁷⁵

Both the Judge of the Appellate Division of the Supreme Court of Bangladesh approvingly referred to the views of the Indian Supreme Court expressed in *S.P. Gupta v Union of India*⁵⁷⁶ which still holds the field in India. As Justice Bhagwati in that case held:

the Additional Judges entered the High Court Judiciary with a legitimate expectation that they would not have to go back on the expiration of their term but they would be either reappointed as Additional Judges for a further term or in the meanwhile, a vacancy in the post of a permanent Judge became available, they would be confirmed as permanent Judges. This expectation which was generated in the minds of Additional Judges by reason of the peculiar manner in which clause (1) of Article 224 was operated, cannot now be ignored by the Government and the Government cannot be permitted to say that when the term of an Additional Judge expires, the Government can drop him at its sweet will. By reason of the expectation raised in his mind through a practice followed for almost over a quarter of a century, an Additional Judge is entitled to be considered for appointment as an Additional Judge for a further term on the expiration of his original term and if in the meantime, a vacancy in the post of a permanent Judge becomes available to him on the basis of seniority amongst the Additional Judges, he has a right to be considered for appointment as a permanent Judge in his High Court.⁵⁷⁷

He further held:

⁵⁷⁵ Ibid. at para 79.

⁵⁷⁶ 1981 Supp SCC 87.

⁵⁷⁷ Ibid. at p. 241 (para 38).

There can, therefore, be no doubt that an Additional Judge is not entitled as a matter of right to be appointed as Additional Judge for a further term on the expiration of his original term or as a permanent Judge. The only right he has is to be considered for such appointment and this right also belongs to him not because clause (1) of Article 224 confers such right upon him, but because of the peculiar manner in which clause (1) of Article 224 has been operated all these years.⁵⁷⁸

F. Strength of Judges of the Superior Courts

The original Federal Constitution of Malaya, 1957, fixed the maximum number of puisne judges (i.e. 15) of the then Supreme Court and empowered the Parliament to increase the number of other judges.⁵⁷⁹ Ultimately the Parliament has been replaced with the Yang di-Pertuan Agong as the authority to increase the number of judges of the Federal Court (at present the total of judges in the Federal Court is 15).⁵⁸⁰ When the Court of Appeal was established in 1994, the Constitution fixed the number of judges at 10 although the Yang di-Pertuan Agong was empowered to increase the number of judges in the Court of Appeal (the present number of judges in the Court of Appeal is 32).⁵⁸¹ The Federal Constitution of Malaysia, 1963 after specifying the maximum and minimum number of judges of the High Courts, empowered the Parliament to vary the number of judges to be appointed in the two High Courts. But in August 1976, this power of the Parliament was taken away and handed over to the Yang di-Pertuan Agong by introducing an amendment to the Constitution (the present strength of the judges of the High Court in Malaya is 60 and of the High Court in Sabah and Sarawak is 13).

⁵⁷⁸ Ibid. at p. 243 (para 40).

⁵⁷⁹ Original Article 122(1), the Federal Constitution of Malaya, 1957.

⁵⁸⁰ The Constitution (Amendment) Act, 1976, (Act A 354), P.U.(A) 114/1982.

⁵⁸¹ Article 122A, the Federal Constitution of Malaysia.

Unlike the original provisions of the Federal Constitution of Malaya/Malaysia, the Constitution of Bangladesh, 1972 has neither fixed the maximum number of judges nor empowered the Parliament to fix or increase the number of judges to be appointed in the Supreme Court. Rather, the number of judges to be appointed in the Supreme Court has, in fact, been kept indeterminate. Like the amended provision of the Federal Constitution of Malaysia, the original Constitution of Bangladesh, 1972 empowered the Head of the State, the President, to determinate the number of judges to be appointed to each division of the Supreme Court (on the advice of the Prime Minister under Article 48(3) of the Constitution). For, Article 94(2) of the Constitution of Bangladesh provides that 'The Supreme Court shall consist of the Chief Justice.... and such number of other Judges as the President may deem it necessary to appoint to each division.' The successive governments have taken full advantage of this kind of stipulation. Although the number of judges in the Appellate Division of the Supreme Court was determined and increased from five to seven in 2002 and then from seven to 11 in 2010, the strength of judges of the High Court Division has never been fixed and, as such, nobody can exactly say what is the strength of judges of the High Court Division of the Supreme Court of Bangladesh. Both the Constitutions of Malaysia and Bangladesh do not contain any basis or ground whatsoever (e.g. increased number of cases, speedy disposal of cases etc) as justification for increasing the total number of judges of the Superior Court which involve the possibility of increasing the strength of judges to accommodate political or personal favourites to the detriment of the quality justice.

Chapter V: Conclusion

In this Chapter, an endeavour will be made to summarise the discussions carried out in the preceding four chapters and recommendations shall be put forward, inter alia to introduce changes in the Constitutional process of appointment of judges of the higher judiciary in Malaysia and Bangladesh so that the executive's present power in the matter of appointment of judges as its 'royal privilege' is curtailed. For, to deprive the executive from exercising its power in the crucial matter of appointment of judges to fashion a judiciary of its choice (i.e. who will share its policy or show affiliation to its political philosophy or exhibit affinity to its ideology) and then to secure the appointment as judges those candidates who possess unimpeachable integrity, spotless character, judicial temperament, firmness, keen intellect, and ability to analyse facts. In a democratic society proclaiming the rule of law, there

cannot be anything of greater consequence than to keep the streams of justice clear and, pure.... [and] We expect our Judges to be almost superhuman in wisdom, in propriety, in decorum and in humanity. There must be no other group in society which must fulfil this standard of public expectation.⁵⁸²

In the words of William Shakespeare 'Good name in man or woman... is the immediate jewel of their souls and Judges share with you and me a taste for such treasures.'⁵⁸³

A. Role of the Judiciary

The judiciary has developed as a just and fair dispute-resolution mechanism to do justice between man and man, between the individuals and the state and ultimately stands between the people and the government as a bulwark against executive's exercise and misuse of power. To interpret law and constitution is the singular and unique province of the judiciary.

⁵⁸² Quoted in Gerald Gall, *The Canadian Legal System* (Toronto: Carswell Legal Publications, 1995).

⁵⁸³ Quoted in Maurice Rosenberg, 'The Qualities of Justice- Are they Strainable?', (1966) 44 *Texas Law Review* 1063, at p. 1068.

The Constitution, which embodies in it the power of the people, has entrusted the judiciary with the vigilant task of keeping executive and legislative within its imperative limits and dictates through the process of judicial review under which it nullifies the unconstitutional acts of these two organs of the government. By checking the executive and the legislative from assuming excessive authority beyond the ken of the Constitution, the judiciary, in fulfilment of the pious trust reposed on it by the people, acts as the watchdog not only of the Constitution but also of democracy and shapes the life of the community. Thus it is indeed the lifeblood of constitutionalism, democracy and welfare of societies.

B. Doctrine of the Separation of Powers and the Independence of the Judiciary

The role of the judiciary as a resolver of disputes, interpreter of laws, watchdog of democracy, guardian of the constitution, and lifeblood of constitutionalism necessitates that it should completely be separated from the other two organs of the government- the executive and the legislative. It is rightly said that the concept of the independence of the judiciary is essentially a result of the 'Montesquian theory of division of power.' The tri-partition of the public decision-makers into the executive, the legislative, and the judiciary is based on the idea that each of these three acting parts should have certain independence in relation to each other.⁵⁸⁴ In countries where parliamentary system of government is in existence, the doctrine of the separation of powers has only been implemented or applied to secure the independence of the judiciary from the control of the executive and the legislative.⁵⁸⁵ The separation of the judiciary from the other two organs of the government is the lifeline of an independent judiciary that constitutes 'the foundation on which rests the edifice... of democratic polity', a setup without which there can be no liberty.

⁵⁸⁴ Supra note 11.

⁵⁸⁵ Because the separation of powers between the executive and the legislative in the parliamentary democracy does not in practice exist; the ministers are not only members of the parliament but they are also accountable to it.

C. Traditional Meaning of Judicial Independence

The most fundamental and long-established meaning of the independence of the judiciary is that the judges are free to perform their judicial functions without the interference of the executive and the legislative and from apprehensions for suffering personally because of the discharge of their judicial duties. In fact, this traditional meaning of the independence of the judiciary speaks of the personal independence of judges.

D. Modern Four Meanings of Judicial Independence

Apart from the traditional concept of personal independence, the concept of substantive independence of the judges, which means that the judges perform their judicial functions without submitting to no other authority but only to the dictates of law and the commands of their conscience, is also universally recognised by law (for example Article 76(3) of the Constitution of Japan, 1946) and legal scholars. The international norms developed specially in the 1980s and 1990s at the initiative of some international non-governmental organisations (like the International Bar Association's Minimum Standards of Judicial Independence, 1982, Law Association of Asia and Western Pacific's Beijing Statement of the Principles of the Independence of Judiciary, 1995) and international conferences (like the First World Conference on the Independence of Justice held in Montreal, in which the instrument titled the Universal Declaration on the Independence of Justice, 1983 was adopted) have thickened and broadened the concept of judicial independence by including into it two other concepts of collective independence and internal independence. Collective independence, which means the institutional, administrative and financial independence of the judiciary as a whole vis-à-vis the executive and the legislative branches of the government, and internal independence, meaning the independence of a judge from any kind of pressure or interference from his judicial superiors and colleagues in coming to decisions in individual cases, are considered as

two far-reaching new components added to the concept of the independence of judiciary. For, independence of individual judges, comprised of personal independence and substantive independence, is virtually ineffective and meaningless without the internal and institutional independence of the judiciary including the powers and facilities that are required to perform judicial functions according to law, without fear or favour, affection or ill-will. Thus the concept of 'independence of judiciary' has currently four meanings or facets:

- I. personal independence;
- II. substantive independence;
- III. collective independence; and
- IV. internal independence.

E. Importance of Judicial Independence in a Democratic State

An independent and courageous judiciary, which is crucial in determining a nation's rank in political civilisation, provides the reason for its existence and continuance. It is *sine qua non* in a democratic society for securing pure and fair justice as strictly defined by law so that the 'lamp of justice' does not go 'out in darkness' and public confidence in the administration of justice also remains unshaken and unaffected. Therefore, in a democratic state, the necessity of an independent judiciary is keenly felt to i) uphold the rule of law, ii) to ensure fair justice, iii) to defend constitutional guarantees of fundamental rights/liberties and iv) to maintain and enhance public confidence in judicial impartiality. The judiciary, which is entrusted with the sole authority to decide over life, liberty, freedom, rights, duties and properties of the citizens, to expound and define the true meaning of law and constitution and to keep executive and legislative organs of the government within the limits of the constitution, can perform its proper role as a sentinel on the *qui vive* only if its independence is completely

ensured and institutional immunity as well as autonomy are guaranteed by constitution and law.

F. Judicial Independence as Enshrined in the Federal Constitution of Malaysia

Unlike the Constitution of Bangladesh, the Federal Constitution of Malaysia does not contain a preamble to incorporate into it the aspiration of justice and speak in the text of the separation of judiciary from the executive organ of the State. Furthermore, unlike the Constitution of Bangladesh, neither the Constitution of Malaysia provide that the judges of superior courts and subordinate courts shall be independent in the exercise of their judicial functions, nor oath to be taken by the judges of the superior courts under the Sixth Schedule containing a promise 'to do right to all manner of people according to law, without fear or favour, affection or ill-will' - the core principle of the independence of the judiciary. Although the absence of any explicit provision concerning the principle of the independence of judiciary in the Malaysian Constitution will go against the assertion that judicial independence is a basic pillar or structure of the Constitution, it contains several provisions to secure and safeguard the independence of the judiciary. These include a) method of appointment, b) security of tenure, c) restriction against alteration of conditions of service to the detriment of the judges after their appointment, d) salaries being charged on the Consolidated Fund, e) restriction on discussion of judges' conduct in the Parliament and f) power of the judges to punish for contempt of court.

G. Judicial Independence as Epitomised in the Constitution of Bangladesh

The concept of the independence of the judiciary has been given the place of a cornerstone in the scheme of the Constitution of Bangladesh; it is one of the central values and basic pillars on which the Constitution is based. The Constitution has embraced the principle of judicial independence by providing for the performance of the judicial functions by the judges

independently and requiring the judges to swear to 'faithfully discharge the duties of ...[their] office according to law' and to hold the scale of justice even between the humblest citizen and an all powerful executive, without fear or favour- regardless of the consequences to themselves. Every accused person has a fundamental right to have a 'speedy and public trial' by not only an independent judiciary but also by an impartial judiciary.⁵⁸⁶ Therefore, the judicial independence has been given teeth through a range of guarantees enshrined in our Constitution, namely, a) method of appointment, b) fixation and security of tenure, c) prohibition on altering the remuneration, privileges and other terms and conditions of services of judges to their disadvantages during their term of office, d) salaries being charged on the Consolidated Fund, and e) power of the judges of superior courts to punish any contempt for maintaining their dignity and authority. But unlike the Constitution of Malaysia, the Constitution of Bangladesh does not contain procedural safeguards to prevent unexpected discussion of the conduct of judges in the Parliament although the rules of procedure of the Parliament provide for such a provision.

H. Substantive Independence, Method of Appointment and the Present Study

Substantive independence, which means the freedom of judges to decide matters before them in accordance with the command of their conscience without submitting to any kind of improper pressures, inducements or influences from any quarter- be it executive and legislative, pressure group, individual or even another judge- is considered as the kernel of judicial independence. Since substantive independence refers to a neutrality of mind of judges in the exercise of their judicial functions, the method of appointment has a great deal of bearing in securing the appointment of right judges who will be men of independent character, keen intellect, high legal knowledge and acumen, professional ability, equanimity, dignity and judicial temperament. In the words of Socrates (469 BC-399 BC), fair judges are

⁵⁸⁶ Article 35(3), the Constitution of the People's Republic of Bangladesh, 1972.

required to do four things, namely 'to hear courteously, to answer wisely, to consider soberly, and to decide impartially.'⁵⁸⁷ An erroneous appointment of an unsuitable person of doubtful competence as a judge on the basis of political or personal favouritism is bound to produce irreparable damage not only to the fair administration of justice but also to the public faith in the administration of justice. Litigant public come to the courts of law to have their disputes adjudicated with the expectation that judges are impartial and independent and they will administer justice according to law without taking into account any extraneous or irrelevant considerations. This kind of faith and trust will fade away if judges are appointed on considerations other than the merit.

Although Prof. Shimon Shetreet maintains that 'politics should be neither a shortcut to nor an impediment in the appointment [of a qualified person] to a judicial office'⁵⁸⁸ which has been endorsed by Chief Justice Sajjad Ali Shah of the Pakistan Supreme Court when he observed that the 'political affiliation of a candidate for judgeship may not be a disqualification provided he is a person of integrity and has active practice as [an] advocate.... and has sound knowledge of law.'⁵⁸⁹ It can hardly be expected that as soon as a judge appointed on the consideration of political allegiance 'takes oath, there is a sudden transformation and he forgets his past connections and turns a new leaf of life.' Justice Pandian in Supreme Court *Advocates-on-Record Association v Union of India*⁵⁹⁰, rightly observed that if the appointee

bears a particular stamp for the purpose of changing the cause of decisions bowing to the diktat of his appointing authority then the independence of judiciary cannot be secured

⁵⁸⁷ *Dictionary of Familiar Quotations* (London: Tophi Books, 1988) at p. 75.

⁵⁸⁸ Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary* (Amsterdam, New York, Oxford: North Holland Publishing Co., 1976) at p. 75.

⁵⁸⁹ Chief Justice Sajjad Ali Shah in *Al-Jehad Trust v Federation of Pakistan*, PLD 1996 SC 324.

⁵⁹⁰ (1993) 4 SCC 441.

notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, conditions of service and immunity.⁵⁹¹

However, since substantive independence (also known as decisional independence) is the core of judicial independence, and method of appointment is the means to select and appoint persons with requisite qualifications and qualities as judges, the present study is undertaken to examine the constitutional process of the appointments of judges to superior courts in Malaysia and Bangladesh.

I. Methods of Appointment of Superior Court Judges in Malaysia and Bangladesh

Both Malaysia and Bangladesh have adopted in their Constitutions the method of appointment in which the executives have been given a pre-eminent role to play with striking diversities regarding prior mandatory consultation with the constitutional entities.

I. 1. Appointment of Chief Justice

Under the existing (as of 2011) arrangement of the Federal Constitution of Malaysia, the Chief Justice, who is the head of the Federal Court, is appointed by the Constitutional Monarch (the Yang di-Pertuan Agong) 'acting on the advice of the Prime Minister after consulting the Conference of Rulers.' The Judicial Appointments Commission, constituted first in February 2009 comprising of nine members of which the majority- five non ex-officio members- are appointed by the Prime Minister, has been empowered to select and recommend suitably qualified persons for the Prime Minister's consideration to advice the Head of the State for appointment as the Chief Justice of Malaysia. But the Prime Minister is not bound to recommend to the Yang di-Pertuan Agong after consulting the Conference of Rulers from among those candidates shortlisted by the Commission for appointment in the vacant post of the Chief Justice. Thus the system of plurality of consultees in the formation of

⁵⁹¹ Ibid. at p. 525.

opinion by the Prime Minister to advise the Yang di-Pertuan Agong does not serve as an inbuilt check against the likelihood of appointing the head of the Malaysian Judiciary taking into account political or extraneous considerations.

But unlike Malaysia, the Constitutional Head of the State of Bangladesh under the 1972 Constitution, as amended in 1991, enjoys unfettered discretion to appoint the Chief Justice of Bangladesh without consulting any constitutional entity, even not required under the amended Article 48(3) to act in accordance with the advice of the Prime Minister. Similarly, unlike the Judicial Appointments Commission of Malaysia, the Supreme Judicial Commission of Bangladesh⁵⁹² was not given the authority to select and recommend candidates to the President for appointment as the Chief Justice of Bangladesh. The established convention of seniority in appointing the senior most judge of the Appellate Division as the Chief Justice of Bangladesh has been violated on five occasions between 2003 and to-date (as of 2011).⁵⁹³ This phenomenon of violating the convention of seniority in appointing the Chief Justice of Bangladesh gained ground after adding to the Constitution in 1996 the new provisions of heading the Non-Party Care-taker Government by the immediate past Chief Justice, to be constituted within 15 days of the dissolution of Parliament as an interim government with the special mandate 'to give to the Election Commission all possible aid and assistance for holding the general election of members of Parliament peacefully, fairly and impartially.' The appointment of the Chief Justice on the ground of political allegiance ignoring the convention of seniority not only shatters the legitimate expectation of the superseded judges but also has the disastrous impact of making the highly dignified and prestigious office of the Chief Justice controversial and of lowering the public faith, confidence and trust in the impartiality of the judges of the highest court of the land.

⁵⁹² The Supreme Judicial Commission of Bangladesh was set up in March 2008 under a Presidential Ordinance and ceased to exist since February 2009.

⁵⁹³ The present Awami League Government within a period of two years breached the principle of seniority on two occasions, first in December 2009 and then in September 2010.

1.2. Appointment of the Puisne Judges

The Federal Constitution of Malaysia, as amended in 1963, 1965 and 1994, empowers the Yang di-Pertuan Agong to appoint the other judges of the Federal Court, the Court of Appeal and the High Courts acting on the advice of the Prime Minister, after consulting the Conference of Rulers. But it has also been made a Constitutional imperative for the Prime Minister to consult the Chief Justice of the Federal Court, who is best equipped to know and assess the worth of the candidates and their suitability for judicial appointment by reason of his long tenure on the bench, before tendering his advice to the Yang di-Pertuan Agong for appointing puisne judges to the Federal Court, the Court of Appeal and the two High Courts. Furthermore, in appointing judges to the Court of Appeal and the two High Courts (the High Court of Malaya and the High Court of Sabah and Sarawak), the Prime Minister is constitutionally obligated to consult the President of the Court of Appeal and the Chief Judge of the concerning High Courts respectively so that every relevant particular about the candidate is known and duly weighed as expert advices by him before presenting his advice to the Head of the State for the appointment of judges to these courts. The Prime Minister has an additional duty to consult the Chief Minister of each of the two States of Sabah and Sarawak before handing over his advice to the Constitutional Monarch in appointing judges to the High Court in Sabah and Sarawak. Thus the appointment process of judges of the superior courts in Malaysia is participatory and certain constitutional functionaries are designed to act in trust as collective repositories for the purpose of selecting the best and most suitable candidates from among those available for appointment as judges of the superior courts. Furthermore, the Judicial Appointments Commission, established in 2009 under an ordinary Act of Parliament consisting of, *inter alia*, the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judges of the two High Courts as its ex-officio members, has been empowered to recommend to the Prime Minister for tendering his advice

to the Yang di-Pertuan Agong three candidates for the appointment as judges in the High Courts and ultimately four candidates for the appointment as judges in the Federal Court and the Court of Appeal. This has given rise to the over-lapping process of exercising powers in the matter of appointment of judges in superior courts. For, the Prime Minister is required under the Constitution after receiving the names of the candidates from the Commission, to consult again the Chief Justice of the Federal Court before tendering his advice to the Head of the State for the appointments of all the judges of the superior courts, consult the President of the Court of Appeal for the appointment of judges to the Court of Appeal and consult each of the Chief Judges of the two High Courts for appointing puisne judges to the High Court concerned. This enabled the heads of the superior courts to express their personal views about the suitability of the candidates for the second time and, as such, enable them to have a 'second bite at the cherry', if they disagreed earlier with the Commission's decision taken in the selection meeting. It should be stressed here that the Prime Minister is free to accept or reject, after consulting the Conference of Rulers, the recommendation of the Commission for appointment in the vacant posts of judges to the superior courts which in essence makes the Commission 'a toothless tiger.' In fact, the selection and appointment of judges in superior courts of Malaysia is still virtually a power of the Prime Minister as the Constitutional Monarch, the Yang di-Pertuan Agong, has no choice but to accept and act on his (the Prime Minister's) advice in the matter of appointment of judges of the Federal Court, the Court of Appeal and the two High Courts.

Unlike Malaysia, where there are now several constitutional and legal entities to consult with in appointing judges of superior courts, in Bangladesh the 1972 Constitution made it imperative for the President to consult only with the Chief Justice of Bangladesh- the single consultee- in appointing regular and additional judges of the High Court Division under Articles 95(1) and 98 and judges of the Appellate Division of the Supreme Court as per

Article 95(1) of the Constitution of Bangladesh. The Chief Justice, who was best suited and had the best opportunity to adjudge the professional experience, knowledge of law, ability, firmness and integrity of the members of the Supreme Court Bar and senior judicial officers (district judges) for appointment as judges, could reasonably be expected to look at the matter of appointment of judges objectively and impartially so that undesirable and unfit persons did not get a berth on the bench. It was tantamount to negate this premise when the Constitutional provision concerning consultation with the Chief Justice was first omitted in January 1975 and then after its restoration in May 1976 for a brief period, the President was again freed from the constitutional obligation of consulting the Chief Justice in appointing judges of the Supreme Court. Thus the unfettered and unrestrained power of appointing judges was vested in the President- the Lord of Lords' in a Presidential form of Government (1975-1979)- leaving the door wide open for intruding political consideration and arbitrariness into the appointment process. However, ultimately in 1978, the convention of consulting the Chief Justice in appointing judges of the Supreme Court was established by President Ziaur Rahman which is still in existence. Ultimately the Supreme Judicial Commission was established under an Ordinance in March 2008, which lasted for less than a year, as a recommendatory authority to select and recommend two candidates for each vacancy (incorporating into law the usual practice) of the Supreme Court. But the President was given the right to accept and reject the candidates recommended by the Commission at his pleasure which defeated the very objective of establishing this nine member-body (which was dominated by six ex-officio members from the Supreme Court) for a cautious, informed, professional and non-political search for the most competent persons for the judgeship of the Supreme Court. Like the Judicial Appointments Commission of Malaysia, Supreme Judicial Commission of Bangladesh was also established neither in pursuance of any provision of the

Constitution nor by introducing any amendment into the Constitution and, as such, can strongly be argued that both the Commissions are unconstitutional.

1.3. Appointment of Judicial Commissioners and Additional Judges

The Federal Constitution of Malaysia, as amended in 1963 provided for the first time the provision for the appointment of judicial commissioners in the High Court of Malaya and the High Court in Sabah and Sarawak. Under the new method of appointment introduced in 1994, the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court may appoint a judicial commissioner for unspecified period or purposes. This is different from the method of appointing regular judges to the High Courts in which the Prime Minister is also required to consult the Conference of Rulers and the Chief Judge of the High Court concerned. Thus the Chief Judges of the High Courts, who are the most competent persons to express their views as to the necessity of appointing judicial commissioners and the suitability of candidates for such an appointment, have deliberately been excluded from the appointment process of judicial commissioners so that the method can easily be used to appoint those persons as judicial commissioners who have rendered valuable services to the government or strongly believe in the philosophy of the government. It seems that keeping this in mind, the Judicial Appointments Commission of Malaysia has not been given the jurisdiction to select suitably qualified persons, who merit appointment as judicial commissioners in the High Courts, for the consideration of the Prime Minister.⁵⁹⁴ But the judicial commissioners have been given the right to apply to the Judicial Appointments Commission for the selection and recommendation for appointment as judges of the High Courts.⁵⁹⁵

⁵⁹⁴ See Section 21, the Judicial Appointments Commission Act, 2009.

⁵⁹⁵ Sections 23(3) and 29, *ibid*.

Like the provision for the appointment of judicial commissioners (in fact additional judges) in the two High Courts of Malaysia, the provision for appointment of additional judges in the High Court Division of the Supreme Court of Bangladesh has become a gateway to the cadre of permanent judgeship in the High Court Division. But unlike Malaysia, where exists a difference between the method of appointment of regular judges and the judicial commissioners to the High Courts, the same method of appointment is followed in Bangladesh in appointing regular and additional judges to the High Court Division of the Supreme Court. Unlike the Judicial Appointments Commission of Malaysia, the defunct Supreme Judicial Commission of Bangladesh was empowered to select and recommend suitable candidates for appointment as additional judges of the High Court Division. Unlike Malaysia, where non-appointment of judicial commissioners as regular judges of the High Courts has never been challenged in superior courts, in Bangladesh non-appointment of certain additional judges as regular judges of the High Court Division was challenged in which the Appellate Division of the Supreme Court in 2009 held that the additional judges only have the right to be considered for appointment as permanent judges in the High Court Division and not beyond. Unlike Malaysia, where consulting the Chief Justice of Malaysia in appointing judicial commissioners to the High Courts is constitutional, the requirement of consulting the Chief Justice of Bangladesh for the appointment of additional judges in the High Court Division of the Supreme Court has been conventional since 1978.⁵⁹⁶ Unlike Malaysia, where in *Re Dato' Seri Anwar Ibrahim's case*⁵⁹⁷ constitutional consultation was given a literal meaning to the effect that consultation does not mean concurrence and the consultant may consider the advice or opinion given but he is not bound by it⁵⁹⁸, in Bangladesh the conventional consultation with the Chief Justice in appointing judges of the

⁵⁹⁶ Supra notes 572 and 573.

⁵⁹⁷ Supra note 561.

⁵⁹⁸ Supra note 562.

Supreme Court by the President was given, to some extent, an extended meaning in *Bangladesh and Justice Syed Md. Dastagir Hossain v Md. Idrisur Rahman, Advocate*.⁵⁹⁹ As it was held in this case that, 'In the matter of selection of the Judges, the opinion of the Chief Justice should be dominant in the area of legal acumen and suitability for the appointment.'⁶⁰⁰ Furthermore, in that case, it was observed that the Prime Minister, on whom (instead of the President) the executive power of the Republic is vested and under Article 48(3) the President is required to act in accordance with the advice of the Prime Minister in the exercise of his constitutional and legal powers, cannot advise the President contrary to the opinion of the Chief Justice regarding the appointment of regular judges and additional judges to the Supreme Court.⁶⁰¹ This is an unacceptable interpretation as there is no such explicit or implicit limitation on Prime Minister's power of advising the President in Articles 95(1) and 98 of the Constitution that deal with the appointment of judges of the Supreme Court. Referring to this observation, Chief Justice Md. Tafazzul Islam in the case of *Khondker Delwar Hossain & Others v Bangladesh Italian Marble Works Limited*⁶⁰² observed in 2010 that:

in view of the declarations given in the Judges case... declaring that convention of consultation being a Constitutional imperative, is binding upon everybody. Accordingly this retention of substituted Article 95 [in which consultation with the Chief Justice was omitted] will have no bearing on the matter of consultation.⁶⁰³

It is true that the independence of judiciary is a basic pillar and cardinal feature of the Constitution of Bangladesh and judicial independence is inextricably linked and connected with the constitutional process of appointment of judges of the Supreme Court. But in

⁵⁹⁹ Supra note 563.

⁶⁰⁰ Supra note 564.

⁶⁰¹ Supra notes 510 and 511.

⁶⁰² Supra note 379.

⁶⁰³ Ibid. at p. 179.

interpreting the provisions of amended Article 95(1) and 98 of the Constitution of Bangladesh, which no longer contain the words 'after consultation with the Chief Justice' in the context of appointing judges by the President, the Supreme Court does not have the right to go beyond the framework and the parameters of the provisions of Article 95(1) and 98 of the Constitution in interpreting these Articles. As Justice Bhagwati of the Indian Supreme Court rightly observed in *S.P. Gupta v Union of India*⁶⁰⁴ that:

We have... to rid our mind of any preconceived notions or ideas and interpret the Constitution as it is and not as we think it ought to be. We can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation.⁶⁰⁵

J. Recommendation

The following recommendations can be put forward regarding a) additional judges/judicial commissioners, b) strength of judges and c) method of appointment.

a) Abolition of the System of Appointment of Additional Judges/Judicial Commissioners

The system of appointing additional judges/judicial commissioners as a gateway through which they are required to pass before being appointed as regular/permanent judges in the High Court Division of the Supreme Court of Bangladesh and in the High Courts in Malaysia should be abolished on the following grounds:

In the first place, since the tenure of judicial commissioners/additional judges is generally two years they can hardly be expected to hold the scale of justice as independently and courageously as a permanent judge in cases, particularly in which the executive- the largest single litigant before the High Courts- is involved.

⁶⁰⁴ AIR 1982 SC 149.

⁶⁰⁵ Ibid.

Secondly, if they pronounce a fair and fearless judgment against the executive it may cost them either appointment as a regular judge or 'for a further period.'

Thirdly, a litigant's confidence in the independence and impartiality of judicial commissioners/additional judges, whose continuance in office after the specified period is subject to the pleasure of the executive, is bound to suffer from the thought that they (judicial commissioners/additional judges) are likely to be biased.

Fourthly, taking into account the adverse impact of appointing additional judges/judicial commissioners on their independence and impartiality, only very few constitutions of the world, e.g. the Constitution of India, 1949, as amended in 1956, the Constitution of Singapore, 1963, the Constitution of Pakistan, 1973 and the Constitution of Sri Lanka, 1978 provide for the appointment of such judges.

Fifth and finally, international standards on the independence of judiciary disapprove the system of appointing temporary judges like judicial commissioners and additional judges. As the Montreal Declaration on the Independence of Justice, 1983 provides that the appointment of temporary judges is inconsistent with judicial independence and calls for phasing out gradually where such appointments exist.⁶⁰⁶

b) Strength of Judges

Since there is the scope of taking decision by the executive to increase the number of judges of superior courts on political considerations (like finding berths on the bench as rewards for those favourites who have 'delivered' as law officers, as party men and judges), rather than judicial considerations (e.g. increased number of cases, speedy disposal of cases), the power of increasing the number of judges of the superior courts in Malaysia and Bangladesh should be given to the Head of the State either on the recommendation of a Judicial Service Commission as it is to be found in Article 79(1)

⁶⁰⁶ Article 2.20, the Montreal Declaration on the Independence of Justice, 1983.

of the Constitution of Namibia, 1990 or upon the request of the Federal Court/ Supreme Court as provided for by Article 3 of the Constitution of Puerto Rico, 1952.

c) *Establishment of a New Forum for Judicial Appointment*

It seems that the present method for selection and appointment of judges to the superior courts in Malaysia and Bangladesh should be given a 'decent burial' for excluding patronage appointment of judgeship or appointment on extraneous consideration. In order to strengthen the independence and impartiality of the judiciary, an independent, effective and meaningful judicial commission, representing various interests with pre-eminent position in favour of the judiciary with the power of selecting and recommending best candidates to the Head of the State for judicial appointment, is the demand of modern times. For, the principles on the independence of the judiciary, formulated and adopted by various international and regional organisations, particularly in the 1980s and thereafter, favour the appointment of judges of superior courts by, on the recommendation, proposal/advice of, or after consultation with an appropriately constituted and representative judicial body.⁶⁰⁷

Furthermore, the Constitutions of Guyana, Algeria, Croatia, Namibia, Fiji, Nepal, Saudi Arabia, South Africa, Rwanda, Poland, Albania, Nigeria and Iraq, adopted in the 1980s and thereafter, provided for the establishment of a nominating or recommendatory judicial body enjoying high degree of independence from the political process.⁶⁰⁸ In very recent times, the Constitution of some of the countries of the world, e.g. the 1973 Constitution of Pakistan as amended in 2010 (provides for the establishment of a Judicial Commission) and the Constitution Reform Act, 2005 of the UK (provides for the establishment of a Judicial Appointments Commission), have been amended to provide for the establishment of an independent body for

⁶⁰⁷ Supra note 284.

⁶⁰⁸ Supra note 285.

selection and recommendation of duly qualified persons for appointment as judges in the superior courts in order to ensure that neither political bias nor personal favouritism and animosity play any part in judicial appointment. In order to bring in greater transparency and accountability in judicial appointments, the Government of India, introduced two Bills, the Constitution (Sixty-Seventh Amendment) Bill, 1990 and the Constitution (Ninety-Eighth Amendment) Bill, 2002, in the Lower House of the Parliament, but both the Bills lapsed.⁶⁰⁹

In *Supreme Court Advocates-on-Record Association v Union of India*⁶¹⁰, Justice Kuldeep Singh of the Indian Supreme Court in giving the words ‘consultation with the Chief Justice of India’ a wide connotation (i.e. that the Chief Justice’s opinion was binding on the Executive), observed: ‘We have come to the conclusion that the exclusion of the final say of the executive in the matter of appointment of judges is the only way to maintain the independence of judiciary.’ Such an objective of maintaining the independence of judiciary should be achieved neither by way of judicial activism (as the Supreme Court of Bangladesh also followed the foot-step of the Indian Supreme Court) nor by passing any Act (as Malaysia did in 2009) or by promulgating any Ordinance (as Bangladesh did in 2008). In order to ensure that the matter of appointment in the superior courts of Malaysia and Bangladesh does not result in politically biased judges or judges who are or feel beholden to the appointing authority, an independent Judicial Appointments Commission/ Supreme Judicial Commission is to be set up through constitutional amendments. The power of appointment of judges of the superior courts by the Head of the State is to be exercised on the recommendation of such a commission. The recommendation of the Commission should be binding upon the Constitutional Head but it shall be open to the Yang di-Pertuan Agong/President to refer the recommendation back to the Commission in any given case along with the information in his

⁶⁰⁹ Supra notes 288 and 289.

⁶¹⁰ (1993) 4 SCC 441.

possession regarding the suitability of the candidates. If, however, after reconsideration the Commission reiterates its recommendation, then the President/Yang di-Pertuan Agong shall be bound to make the appointment. Preferably the Judicial Appointments Commission/Supreme Judicial Commission should consist of ex-officio members from the higher judiciary (e.g. the Chief Justice and the five senior most judges), last retired Chief Justice or Judge and Professor of Law on the basis of seniority from public universities by rotation. In this context, it is very pertinent to remind the immortal words of former Chief Justice of Australia, Sir Harry Gibbs who said in 1987:

Judicial Commissions, advisory Committees and procedures for consultation [with the Chief Justice] will be useless unless there exists, among the politicians of all parties, a realization that the interest of the community requires that neither political nor personal patronage nor a desire to placate any section of a society, should play any part in making judicial appointments.⁶¹¹

He further added that 'no procedure will be effective if the will to appoint only the best is lacking. In the end, we must depend on the statesmanship of those in all political parties.'⁶¹² Chief Justice Harry Gibbs's requisite 'statesmanship' of political leadership is to be found in former British Prime Minister Gordon Brown who, even after enacting Constitutional Reforms Act, 2005 which radically changed the way in which judges are appointed by investing the whole process of selection in the hands of the independent Judicial Appointments Commission, said on 3 July 2007:

For centuries, they [the Executive] have exercised authority in the name of the monarchy without the people and their elected representatives being consulted. So I now propose that in 12 important areas of our national life, the Prime Minister and the Executive should surrender or limit their powers, the exclusive exercise of which by the Government of the day should

⁶¹¹ Harry Gibbs, 'The Appointment of Judges', (1987) 61 *Australian Law Journal* 7, 11.

⁶¹² *Ibid.*

have no place in a modern democracy ... and I purpose that the Government should consider relinquishing its residual role in the appointment of judges.⁶¹³

It is our earnest and sincere expectation that in near future we shall be able to hear from any Malaysian or Bangladeshi leading personality echoing the words of the first Chairman of the Judicial Appointments Commission of the UK, who in her first speech in November 2006 said: 'For the first time in its 1,000-year history, the Judiciary is fully and officially independent of the government. This has been described as the most significant change since *Magna Carta* in 1215.'⁶¹⁴

⁶¹³ Quoted in Ministry of Justice, *The Governance of Britain: Judicial Appointments* (Consultation Paper Code No CP 25/07, 25 October 2007) at p. 5.

⁶¹⁴ Speech by Baroness Prashar, Chairman of the Judicial Appointments Commission, at the Society of Construction Law, 22 November 2006 <http://www.judicialappointments.gov.uk/static/documents/JAC_Speech_Society_of_Construction_Law_221106.pdf> (accessed on 1 December 2010).

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